TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 469.

FREDERICK J. LOWREY, GEORGE P. CASTLE, AND WILLIAM O. SMITH, TRUSTEES, APPELLANTS,

vs.

THE TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MAY 27, 1900.

(21,095.)

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1 In the Supreme Court of the Territory of Hawaii.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,

v.

THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Amended Petition.

To the Honorable the Supreme Court of the Territory of Hawaii:

Your petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, respectfully represent that they have a claim against the Territory of Hawaii; that said claim is founded upon the statutes of this Territory hereinafter referred to and also upon the contract with the said Territory hereinafter described, and the particulars of said claim your petitioners set forth as follows:

I.

The American Board of Commissioners for Foreign Missions, hereinafter referred to as the A. B. C. F. M., for many years prior to 1850 had conducted and maintained a Protestant Mission in the Hawaiian Islands, hereinafter referred to as the Mission, and as an essential part of its missionary work carried on many schools. But its most notable educational work in said connection was centered in a school at Lahainaluna, on the Island of Maui, where it
2 possessed a large tract of land on which it had expended many thousands of dollars in the erection of buildings and other improvements, which school had at said date become a most important factor in the life and progress of the Hawaiian people, and was then the recognized leading educational institution in the Kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the Mission.

See Exhibit "AA" being parts of the Laws of the School at Lahainaluna, as Amended and Adopted by the Mission, June 1835.

II.

The facts in regard to the title to said Lahainaluna are as follows: In 1835, the A. B. C. F. M., having established a school at the locality about 1831, the premises occupied by it were set off by the chiefs to the Mission for its purposes, whereupon important improvements were made and the school became permanent. These facts were well established before the Board of Commissioners to quiet land titles by the evidence of Hon. William Richards, David Malo and others.

Upon the establishment of the said Board of Commissioners to quiet land titles, the claim of the A. B. C. F. M. to Lahainaluna as

an established part of its system was duly presented and recognized and became "Part 5, Section 2, Lahainaluna" of claim 387.

See Vol. 2, Foreign Register, pp. (9), 12 and 26.

The evidence on which the claim was established appears in full in

Vol. 2 of Native Testimony, p. 220.

Upon the adjudication of the claims set forth in No. 287, appears the following:

"Lahainaluna, Part 5, Section 2, claim relinquished before the Land Commission in consequence of an after-arrangement
3 having been entered into with the Hawaiian Government by the Mission." Vol. 3 L. C. Award p. 143, et seq., upon the final confirmation which was duly made to the said A. B. C. F. M., all the lands claimed were awarded "with the exception of Section 2, Lahainaluna, which had been withdrawn." (Do. p. 181.)

Thus the title of the A. B. C. F. M., to the premises, and its right to an award, was clearly recognized.

III.

The "after arrangement" referred to in the records of the Land Commission was briefly as follows:

Because of financial stress and also feeling that the school which had really become a national institution, should be conducted by the Government at its own expense, in April, 1849, the Mission at its general meeting held at Honolulu, voted as follows: "To make over this seminary to the Government; it being understood that it is to be conducted on the same principles as heretofore."

See Minutes of the General Meeting of the Sandwich Islands Mission, held at Honolulu, April and May, 1849.

An offer was thereupon made to the Government in pursuance to this vote of the Mission to make over the school to the Government on condition that it should "be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the Confession of Faith herewith enclosed, and that in case of the Non-fulfillment or violation of the conditions, upon which this transfer is made, by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements—
4 should revert to the said Mission. See Exhibits A and A-1.

This offer as made was not accepted by the Government, but it instead submitted a counter offer to the Mission by which it offered to take over the school on the conditions made in the Mission's original offer, but "provided that in case of the nonfulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for

Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000 to said Mission, in behalf of the Mission Board in Boston.

See Exhibits B, C, D, and E.

Evidently feeling that the "Confession of Faith (Exhibit A-1) was rather loosely drawn, that Mission offered to substitute a more definite form which was accepted by the Government.

See Exhibits F, F-1 and G.

It was necessary in order that this whole arrangement should have full force, that it should be ratified, both by the Hawaiian Legislature and the Prudential Committee of the A. B. C. F. M. This was done by the passage of the act of the Legislature of July 11, 1850.

See Laws of 1850 (P. C. 1850) p. 157, Sec. 1, or Civil Code (1859), Sec. 738,

and the adoption of a resolution by the said Prudential
5 Committee. See Exhibit H.

IV.

The Hawaiian Government at once took possession of the Lahainaluna Seminary and carried on the school exactly as it had been conducted by the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the Government had taken over the school the principals of the school continued their relations as missionaries of the A. B. C. F. M., in their work in the school and continued to make reports of their educational and religious work and instruction in the school to the general meetings of the Mission.

See Exhibit "H" and see annual reports of general meetings of the Mission.

In 1862 the seminary buildings were burned down and there was a fear that the Government would not rebuild and continue the school, but the reply came from Honolulu "Lahainaluna must be rebuilt," and it was done at once by the Board of Education.

The principal, in his report for that year, 1862-3 reviewing the history of the school, says: "The Hawaiian Government has always been a liberal friend and benefactor * * * Never in any way have they interfered with our manner of instruction, or in the course of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who under the religious instruction at the school became ministers, he says: "While 6 who were connected with it since it has been under the care of the Hawaiian Government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii, the Board of Education appointed as instructors such persons as
were acceptable to the Mission, generally selecting those
6 nominated by the Mission. When the Anglican Mission was established it was proposed that the forms, and probably the

substance of religious instruction in public schools, should be changed, and advice was asked of the Attorney General. Hon. Charles C. Harris in reply to the request reviews the whole arrangement, and discussing the "Confession of Faith" says: "It follows that any who teach these doctrines enumerated in the said Confession, and the remainder of whose teachings do not work adversely to those enumerated in the said "Confession," may teach in, or even direct the school." He then refers to the substitution of the Second Confession, saying that it is a much stronger instrument, and proceeds,—"and therefore if any sect of Christians teach the doctrines of each and all of those articles, they may hold the control of the school—they must * * * hold all of these points. Should the Government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M.

Extract from letter of Attorney General Harris to President Board of Education, Oct. 29, 1864.

It was feared that an attempt would be made to establish a state religion and church, and comment was sharp and zealous on all acts of the Government, especially in the matters of education. The "Hawaiian Gazette" was at that time the official mouth-piece of the Government and, discussing the public schools, in the issue of June 3, 1865, there appears an editorial which contains the following:

"The Government has very properly decided that its support shall be given to schools irrespective of religious teaching, and in the native common schools it is absolutely forbidden as it has been thought more suitable that this necessary branch of education should be left to the parent and ministers of religion. At the same time there is one instance in which some of our readers may imagine that the board is chargeable with partiality or supporting a state church, inasmuch as it pays a large annual sum to defray the expenses of the Seminary of Lahainaluna where the principles and theology of one particular sect are exclusively taught, although opposed to the belief of all in communion with the Roman Catholic and Episcopal Churches."

The same number of that organ contains the "Rules and Instructions to School Agents and Teachers of Government Schools," in which, Article I, "Religious instruction is strictly forbidden," thus emphasizing the difference at Lahainaluna where "the principles and theology of one sect are exclusively taught."

The following year, upon the suggestion by the Mission of certain names as instructors, correspondence arose upon the right of the Mission to nominate. While absolutely denying the existence of such right, the Board of Education says: "It is understood that the institution is to be continued so as to aid, instead of defeating the purpose for which it was founded, and there has nothing been done to justify the intimation that the Board have any desire to defeat such purpose, or to introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders," and definitely admitted "that a full compliance with the agreement consists in appointing persons teaching in the doctrine

and after the manner of the Congregational and Presbyterian Churches of the United States."

Regarding the rights of the Mission, the Board of Education further says: "The Board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or to pay the sum of $15,000."

Extract from letter, Board of Education to S. N. Castle, June 30, 1865.

8 After 1865 Lahainaluna Seminary continued to be conducted on the same lines as prior thereto. But during the session of the Legislature of 1884 the argument was used in favor of an appropriation for St. Louis College that the Government was maintaining a sectarian school at Lahainaluna. In 1888 the argument was repeated in favor of the act to set off certain premises for the Roman Catholic Church, and its truth was admitted in both cases.

V.

In 1894 the Constitution of the Republic of Hawaii was promulgated. Article 98 thereof provides that * * * "No public money shall be appropriated * * * for the support or benefit of any sectarian, denominational or private school." This provision is continued and remains in full force as a part of Section 55 of the Organic Act.

Religious instruction upon the lines formerly pursued by the Mission, and subsequently by the Government in accordance with the agreement, was continued up to on or about September 1st, 1903, but ceased to be a part of the curriculum at Lahainaluna on or about said first day of September, 1903, and religious tenets and doctrines in accordance with the creed and articles of faith of the Mission then ceased to be taught and are no longer taught.

The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

See Report of Governor of Hawaii for 1904, p. 32;

See Exhibit I;

See extract from report of the Superintendent of Public Institutions to Governor of Hawaii, included in the above report for 1904 above referred to on page 35.

9 That the Territory maintain no other institution of like character and on similar principles in any other places on these Islands.

VI.

That all the rights, property and interest of the American Board of Commissioners for Foreign Missions to any property in the Territory of Hawaii and any claim or demand whatsoever with reference thereto was by deed, duly executed and delivered, conveyed to Henry Waterhouse, since deceased, and your petitioners, Frederick J. Lowrey and William O. Smith by deed of trust, dated July 25, 1903, and recorded in the office of the Registrar of Conveyances

in Honolulu, Island of Oahu, Territory of Hawaii, in Liber 254, pages 91 to 101.

That by the provisions of said trust deed in case of the decease of any of the trustees, the said American Board of Commissioners for Foreign Missions could appoint by certificate in writing duly acknowledged and authenticated and recorded in the office of the Registrar of Conveyances in Honolulu, a successor who upon said appointment should be vested with all the rights of said deceased Trustee and subject to the same obligations and duties. That said Henry Waterhouse has died since the execution and delivery of said trust deed and in accordance with said provision your petitioner, George P. Castle, was duly appointed as Trustee by said A. B. C. F. M., by certificate in writing duly recorded in said Registry.

That the right to recover, hold and manage any of the said properties or interests or rights, or any rights or interests arising therefrom or with reference thereto, so conveyed by the said trust deed, are now vested in your petitioners.

10 *Claim.*

Upon the foregoing facts, petitioners claim that the A. B. C. F. M., in April, 1849, was the owner of the land and improvements thereon occupied by the school or seminary at Lahainaluna; that at that time, in pursuance to an agreement between the said A. B. C. F. M. and the Hawaiian Government, as subsequently ratified by the said A. B. C. F. M. in August, 1849, and by the Hawaiian Legislature in July, 1850, the said A. B. C. F. M. transferred the said Lahainaluna School or Seminary and property to the said Government, in consideration of the agreement of the said Government to continue in the said school the teaching of the religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the Mission, as summarized in a Confession of Faith submitted by the said Mission, not to teach or allow to be taught in the said school any religious tenet or doctrine contrary to those so inculcated by the said A. B. C. F. M. through the said Mission, and further to continue the said school at its expense as an institution for the cultivation of sound literature and solid science; and in case of the non-fulfillment or violation of any of the said conditions, the whole property so transferred, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges so transferred, to revert to the said A. B. C. F. M. or the said Government to pay the sum of Fifteen Thousand (15,000) Dollars to the said A. B. C. F. M. at the option of the said Government; that

First. Said Government on or about the first day of September, 1903, ceased to continue the teaching of the said religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the said Mission, contrary to its agreement; and therefore

11 the said Government must now either return the property, together with all improvements, or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement;

Second. That on or about July 1, 1904, the said Government ceased to continue the said school as an institution for the cultivation of sound literature and solid science, contrary to its said agreement, and therefore the said Government must now either return the property together with all improvements or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement.

That on or about the first day of September, 1904, your petitioners presented the foregoing claim to the Department of Public Instruction and to the Governor of the Territory of Hawaii and demanded that the Territory should reconvey the premises and property herein described or pay to them the sum of said Fifteen Thousand (15,000) Dollars, at the election of said Territory; and that the said Department of Public Instruction and the said Governor refused to either reconvey said premises and property or to pay the said sum of Fifteen Thousand (15,000) Dollars, and that the said Territory has elected to retain said premises and that election is evidenced by said refusal and by the further fact that it is proceeding to erect expensive and extensive buildings on said site and is proceeding to expend large sums of money in fitting said premises and said school to become a technical school, namely an agricultural school.

That your petitioners are the owners of said claim against the Territory of Hawaii; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, and that said claimants are justly entitled to the amount herein claimed, namely,
the sum of Fifteen Thousand (15,000) Dollars, after allow-
12 ing all just credits and offsets; that your petitioners and said
Henry Waterhouse and said American Board of Commissioners for Foreign Missions have and each of them has at all times borne allegiance to this government and have not in any way voluntarily aided or abetted or given encouragement to rebellion against this government and that they believe the facts as stated in this petition to be true.

Wherefore, your petitioners pray that this Court shall hear and determine the facts in reference to said claim and may adjudge that your petitioners are entitled to judgment against the Territory of Hawaii in the sum of Fifteen Thousand (15,000) Dollars, and shall cause notice of the institution of this petition to and these proceedings against the said Territory to be given to the said Territory and set a time for the hearing of the same.

(Sig.) F. J. LOWREY.
" WILLIAM O. SMITH.
" GEORGE P. CASTLE.

(Sig.) CASTLE & WITHINGTON,
" SMITH & LEWIS,
Attorneys for Petitioners.

TERRITORY OF HAWAII,
Island of Oahu, Honolulu, ss:

Frederick J. Lowrey, William O. Smith and George P. Castle, being duly sworn each for himself, deposes and says: That he is

one of the petitioners above named, that he has read the fore-
13 going petition and that he believes the facts therein stated to be true.

(Sg.) F. J. LOWREY.
(Sg.) WILLIAM O. SMITH.
(Sg.) GEORGE P. CASTLE.

Subscribed and sworn to before me T. M. H. this 6th day of December, 1905.

T. M. HARRISON, [SEAL.]
Notary Public.

EXHIBIT AA.

Laws of the High School, as Amended and Adopted by the Mission, June, 1835.

Chapter I.

Design of the School.

The design of the High School is,

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious.

4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

Chapter VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sun-
14 rise each week day for prayer, at which one of the Instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, Archeology and Sacred Geography. And Friday afternoon of each week or time equivalent shall be spent in exhibiting and correcting compositions in the Hawaiian language, and in elocution.

EXHIBIT A.

HONOLULU, *April* 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

SIR: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of His Government that in the year 1831, the Mission commenced the establishment of the institution now known as the Mission Seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the Islands.

From that period to the present time, this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its appro-
15 priate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the Islands, filling various ports of honor, responsibility and usefulness, both in and out of the Government. They are well known to His Majesty, and the officers of His Government, and to none better than yourself.

This institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American Churches for the spread of the gospel in heathen lands. That Board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00 incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the Missions under its care, and this Mission in common with others has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the rigor to be desired in all of its departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests of the

Hawaiian people, we beg leave through your Excellency to
16 submit to His Majesty's Government for its consideration the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the Seminary buildings located at Lahainaluna on the Island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the Mission as a printing office and bindery, also all lands pertaining to and granted for the use of the Mission Seminary, and also all philosophical and other apparatus procured for the use of the said Seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said Government, the whole property hereby transferred,
17 hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government, by the said Island Mission, shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian Government shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board — Commissioners of Foreign Missions in Boston; and further should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the conditions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission on its part, pledges itself to refund to the said government any necessary expenses it may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper

to be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's government, and the Mission will feel greatly obliged by an early answer.

18 We have the honor to be,

Very respectfully,

Your Ex. friends and Most Obedient servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE.

Com. by S. N. Castle.

Confession of Faith.

EXHIBIT A-1.

I believe in Jehovah; that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is everywhere present and sees all things; that in power and wisdom, and goodness, in all perfections and excellences he is infinite; that he made the earth and the heavens, men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure, that he alone is God and that all beside him that are called gods are vanity and the work of errors.

2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that consequently, all mankind of every generation are naturally in a state of corruption, guilt and death.

4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his Son into the world, made of a woman and in the likeness of man.

5. I believe in the Lord Jesus Christ; that he is the Son of God; that he died upon the cross as a propitiation for our sins, and

19 for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justifications unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the King of Zion, has all power in heaven and earth, and will judge the quick and the dead.

6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

7. I believe that in all ages, Jehovah has had a church in the

world, in which he has graciously dwelt, and which he designs to establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

8. I believe in the resurrection of the body; in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

EXHIBIT B.

Passed in Privy Council April 26, 1849.

A communication having been received from the Rev. W. P. Alexander, Rev. C. B. Andrews and S. N. Castle, as a committee of the American Mission of these Islands proposing to transfer the entire property of the Seminary at Lahainaluna, Island of Maui, to the Government of the Hawaiian Islands, to be its property forever, on certain specified conditions, Therefore,

Resolved, I. That the above proposals be accepted, subject
20 to the ratification of the Legislature; provided, that in case of the nonfulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the *the* Island, or pay the sum of $15,000. to said Mission, in behalf of the Mission Board of Boston.

Resolved, II. That the sum of $3000. be appropriated from the Royal Treasury for the support of said Institutions for one year, commencing on the first day of June next.

Resolved, III. That the Minister of Public Instruction be instructed to secure the services of two competent teachers for said Seminary on such terms as to him may seem equitable and proper.

Resolved, IV. That the Institutions be committed to the Minister of Public Instruction, as in the case of the Royal School; and that it be his duty to make an annual report of the same to the Legislature.

Resolved, V. That all lands belonging to the Government in Kaanapali be appropriated to the use of the said Seminary
21 at Lahainaluna, to be disposed of by the Minister of Public Instruction in consultation with the King's Cabinet with a view to providing as far as possible, an annual income for the support of the Seminary above named.

EXHIBIT C.

OFFICE OF PUBLIC INSTRUCTION, *April 27th*, 1849.

To Rev. Wm. P. Alexander, Rev. C. B. Andrews, S. N. Castle.

GENTLEMEN: I have the honor to acknowledge the receipt of your letter of the 25th inst. proposing on certain conditions, to transfer the Seminary at Lahainaluna to the Government of these Islands; and to inform you that your generous proposal was this day submitted to His Majesty in Privy Council, and the resolutions enclosed were unanimously adopted with reference thereto.

You will please to inform me at your earliest convenience, whether the several conditions specified in these resolutions are acceded to by the Mission; and accept in the meantime the acknowledgements of His Majesty's Government for so valuable an offer.

I am gentlemen, with the highest esteem, your obedient humble servant,

(S'g'd) RICHARD ARMSTRONG,
Minister of Public Instruction.

EXHIBIT D.

HONOLULU, *April 28th*, 1849.

To Ex. R. Armstrong, Minister of Public Instruction of His Hawaiian Majesty.

22 SIR: Your letter of the 27th inst. with certain Resolutions of His Majesty's Privy Council accompanying, in answer to and based upon certain proposals, made by the undersigned as committee, on behalf of the American Mission, through your Excellency, to His Majesty's Government, respecting the Mission Seminary, on the 25th inst., came to hand last evening.

The said letter and resolutions have been laid before the General Meeting of the Mission, for its action and we are directed to furnish your Excellency, for the use of His Majesty's Government a copy of the preamble and resolutions adopted on the occasion, which we have the honor to transmit herewith.

We remain very truly,
Your most obedient servants,

(S'g'd) W. P. ALEXANDER,
" C. B. ANDREWS,
" S. N. CASTLE,
Committee.

EXHIBIT E.

Preamble and Resolutions Adopted in General Meeting April 28th, 1849.

Whereas, a letter has been received by this Mission through Messrs. Alexander, Andrews and Castle, a committee appointed in reference to the Mission Seminary at Lahainaluna, from Mr. Armstrong, His

Majesty's Minister of Public Instruction, accompanied by a copy of Resolutions passed by his Majesty's Privy Council of the 27th of April last; accepting of certain conditional proposals, in reference to the said Seminary, made by said Committee on behalf of the Mission on the 25th inst., and

Whereas, His Majesty's Government has been pleased to
23 add certain other proposals or conditions to those of said committee, made on behalf of the said Sandwich Islands Mission therefore:

Resolved 1st. That this Mission, assembled in General Meeting, approve of and accept the said additional conditions proposed by His Majesty's Government and that, if further testimonials of conveyance than is found in the correspondence between the said Committee and the said Hawaiian Government, be deemed necessary by the said Government, the Minister of Public Instruction, or such other officer as shall be deemed proper by His Majesty's Government, be requested to make or cause to be made out duplicate copies of the said Instrument of Conveyance, embracing all particulars, which shall be thought necessary, one of the said copies to be delivered to this Mission, to be deposited in its Archives."

Resolved 2nd. That the said Committee be instructed to furnish the Mission of Public Instruction with a copy of this preamble and these resolutions for the use of His Majesty's Government.

Exhibit F.

Honolulu, *May 8th*, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of His Hawaiian Majesty.

Sir: Being instructed by the American Mission, in their General Meeting lately adjourned, we would, as their Committee, most respectfully present for your consideration the confession of faith within enclosed, as a substitute for the one given with the articles of agreement transferring the Mission Sem'y, at Lahainaluna, to the Hawaiian Government.

The reasons for requesting the substitution are, that the
24 previously presented confession, although according in all its specified doctrines with our belief and with that also of the Churches by whom that institution has been founded and sustained, is yet not so distinctive, as to present a barrier to the introduction there, of other deleterious doctrine not specified in said confession. It will admit also, of teachings of this Mission and of the Churches sustaining it, such as we feel to be entirely subversive of Evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain,

Your Ex. Most Sincere Friends and obedient servants.

(Sig.) W. P. ALEXANDER,
" C. B. ANDREWS,
" S. N. CASTLE,
Committee.

EXHIBIT F-1.

Confession of Faith.

We believe:

1. That there is one only living and true God, the Creator, preserver, and Governor of the Universe; a Being Self-existent, independent, and immutable, infinite in power, wisdom, justice, goodness, mercy and truth:

2. That the Scriptures of the Old and New Testaments were given by inspiration of God; that they contain a complete and harmonious system of Divine truth, and are the only perfect rule of Christian faith and practice:

3. That God is revealed in the Scriptures as the Father, the Son and the Holy Ghost, and that these three are one, and in all Divine attribution, equal:

25 4. That God made all things for himself; that he governs all things according to the council of his own will, and that the principles and administration of the government are holy, just and good:

5. That our first parents were originally holy; that they fell from that state by transgressing the command of God; and that, in consequence of their apostacy, all their descendants are without holiness, and alienated from God, until their hearts are renewed by Divine Grace:

6. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, and death made an atonement for sin, on account of which pardon and salvation are offered to all who truly repent and believe in him; and that all who will, may come and take of the water of life freely; but, that such is the aversion of man to those terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit:

7. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be Holy and without blame before him in love; and that they should be saved not by works of righteousness which they have done, but according to the distinguishing mercy of God, through sanctification of the Spirit, and belief of the truth:

8. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto Salvation:

9. That there will be a general resurrection both of the just and the unjust; and a day of judgment, when all must give account to Christ of all deeds done in the body; when the impenitent will go away into punishment, and the righteous into life, both of which will be without end:

10. That the Lord Jesus Christ has a visible church in the 26 world; that the terms of membership are a credible profession of faith in Christ, and of that holiness which is brought by the renewing grace of God; that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper, and that only they and their households can be admitted to the ordinance of Baptism.

EXHIBIT G.

Office of Public Instruction.

To Rev. Wm. P. Alexander, Rev. C. B. Andrews, S. N. Castle, Esq.

GENTLEMEN: Your letter of May 8th, enclosing a confession of faith which you request may be substituted for the one accompanying your letter of the 25th of April, has been received, and I have only to state that the request is granted, and the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board and the Legislature of the Islands.

Very respectfully,
Your humble servant,

R. ARMSTRONG,
Minister of Public Instruction.

EXHIBIT H.

HONOLULU, *March* —, 1850.

DEAR SIR: On behalf of the Committee acting for the Mis-
27 sion in the interim of the General Meeting, I beg leave for the information of His Majesty's Government to communicate to you the following Resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Mission on the 21st of August, 1849, viz:

Resolved, that the agreement "entered into by the Sandwich Islands Mission in April last, transferring the Seminary at Lahainaluna, in the Sandwich Islands, to the Government of said Islands, on conditions stated in a letter from the Mission to the Minister of Public Instruction, dated, Honolulu, April 25, 1849, and in a letter from the Minister of Public Instruction, dated April 27, 1849, be approved by the Prudential Committee and that the Secretary, having charge of the foreign correspondence, give immediate information of this fact to the Mission."

Very respectfully,
Your friend and servant,
(Sig.) SAML. N. CASTLE.

To His Ex. R. Armstrong, Minister of Public Instruction, of the Hawaiian Government.

EXHIBIT "II."

Extract from Letter from Rufus Anderson, Sexretary of A. B. C. F. M., to Reverend William P. Alexander, Sandwich Islands, Dated Missionary House, Boston, July 27, 1850.

You ask that your release may take effect from June 1, 1849; assigning as a reason, that you have drawn nothing from the funds

of the Board since that date, the Hawaiian Government having paid your salary during the year as teacher of the Seminary at Lahainaluna; and that, by fixing this date for your release, the Mission will be saved from the trouble of settling any questions relative to
28 the avails of a few surveying excursions you made during the year. It seems to the Committee, as at present advised, that the fact of your salary's being paid by the Hawaiian Government does not itself at all affect your relation to the Board and to the Mission. While connected with the Board, you of course sustain a full connection with the Mission as such, and instruct in the Seminary as a Missionary of the Board and a member of the Mission. It can make no difference whether your salary be paid by the Hawaiian Government or not (though we of course expected them, when they took the Seminary to defray all its expenses), or whether it is paid directly to you or into the treasury of the Mission.

EXHIBIT I.

Extract from Report of Superintendent of Public Instruction to Governor of Hawaii, Including in the Report for 1904, *page* 35.

At the beginning of this school year the department of public instruction undertook a complete reorganization of Lahainaluna. Arrangements were made for erecting proper and convenient buildings and an entirely new set of instructors was obtained. The aim of the institution at the present time is to be an agricultural school. A carpenter shop, a blacksmith shop, and a modern printing outfit have been supplied. Draft animals have been purchased and a considerable quantity of land has been put into cultivation. But for the delay in erecting the new buildings the institution could have very many more pupils that it supports at present. There is every hope, however, that during the coming year a complete success may be made of the place. A thoroughly revised curriculum will be adopted at the commencement of the year.

Indorsement: No. —. Supreme Court, Territory of Hawaii. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, vs. The Territory of Hawaii. Amended Petition. Filed December 6, 1905, at 3:10 P. M. J. A. Thompson, Clerk. Castle & Withington and Smith & Lewis, Attorneys for Petitioners.

29 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1905, December Session, A. D. 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Demurrer of Respondent Territory of Hawaii.

Now comes the Territory of Hawaii, by M. F. Prosser, Esq. Deputy Attorney General of the Territory of Hawaii, and demurs to the amended petition of petitioners heretofore filed herein on the following grounds and for the following reasons:

1.

That this Court has no jurisdiction of the subject matter of the claims as set forth in said petition.

2.

That there is a non-joinder of parties respondent in that the United States of America is a necessary and proper party respondent the property in said petition described having been, by the Republic of Hawaii, transferred and ceded to the United States of America by the treaty of annexation adopted and approved July 7th 1898.

3.

That said petition does not state facts sufficient to constitute a cause of action as against this respondent in that:

(*a*) It appears by said petition that the purported agreement therein set forth was subject to, and of no effect without, ratification by the legislature of the Kingdom of Hawaii and it nowhere appears in said petition that such agreement as set forth
30 therein was ever ratified by such legislature.

(*b*) That it appears by said petition that petitioners' right of action, if any, accrued more than two years prior to the commencement of this action.

(*c*) That it does not appear by said petition that there has been a breach of any condition upon which the transfer therein set forth to the Kingdom of Hawaii was ever made.

(*d*) That it affirmatively appears by said petition that the conditions of said purported agreement if broken at all have been broken in compliance with laws and statutes which render the fulfillment of such conditions impossible.

4.

That said petition is indefinite and uncertain in that the allegations therein contained as to breach of conditions as therein pleaded

are conclusions of law, it nowhere appearing in said petition in what respect the conditions therein pleaded have been broken.

Dated Honolulu, December 15th, A. D. 1905.

TERRITORY OF HAWAII,
(S'g'd) By M. F. PROSSER,
Deputy Attorney General.

Indorsement: Supreme Court Territory of Hawaii. Oct. Term, 1905. Dec. Session 1905. Frederick J. Lowrey, et al., Petitioners vs. The Territory of Hawaii, Respondent. Demurrer of Respondent, Territory of Hawaii. Filed Dec. 15, 1905, George Lucas, Clerk. M. F. Prosser, Dep. Atty. Genl. For Ter.

31 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees,
v.
THE TERRITORY OF HAWAII.

Original.

Argued December 18, 1905; decided January 3, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Territory—Action Against, for Its Breach of Agreement Made in 1849 Between the Hawaiian Government and American Board.

This court has jurisdiction of an action of assumpsit by the successors of the American Board of Foreign Missions brought upon a breach by the Territory of an agreement made between the board and the Hawaiian government in 1849.

Id.—Agreement—Construction of—New Term Not Added by Acts of Parties.

A transfer was made by the American Board to the Hawaiian government of the Lahainaluna school property on condition that "the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission," etc., and that in case of nonfulfillment of the condition the sum of $15,000 should be paid. From the date of the transaction until 1903, religious instruction continued to be taught at the school as previously, both parties appearing to regard such instruction as required by their agreement. *Held:* the express agreement does not require that the specified instruction should be given, and the terms

of the agreement being clear and unambiguous the practical construction which the parties have made does not introduce a new term in the agreement.

The school was changed by the Territory to a technical school under the name of the "Lahainaluna Agricultural School." *Held:* this is not a breach of the agreement to continue the institution for the cultivation of sound literature and solid science.

Opinion of the Court by Hartwell, J.

The plaintiffs claim of the defendant the sum of $15,000 for its breach of agreement under the following circumstances:

32 In 1849, the Hawaiian government, at the suggestion of the American Board of Commissioners for Foreign Missions, took the Lahainaluna school property on the Island of Maui, which consisted of a claim of the board, then withdrawn, for a Land Commission Award for the land used by the school and the school buildings, library and philosophical and other apparatus which were burned in 1862 and replaced by the government. A letter of April 25, 1849, from W. P. Alexander, C. B. Andrews and S. N. Castle, a committee of the Hawaiian Mission representing the board, to Richard Armstrong, Minister of Public Instruction, expressed the condition on which the transfer was made to be as follows: "That the said institution *shall be continued* at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." A further proviso was expressed in the letter that "in case of non-fulfillment or violation of the conditions" the property should revert to the mission, or, as modified by the government, it might at its option pay the sum of $15,000, and if it should divert the establishment to any other purposes than those of education it would "sustain an institution of like character and on similar principles in some other place on the islands, or pay the sum of $15,000."

The plaintiffs contend that the expressed agreement meant not only that the government should not teach nor allow the teaching of any religious doctrines contrary to the specified confession of faith, but that it should require those doctrines to be taught. This contention is based upon the facts averred in the petition that the American Board in 1835 obtained the Lahainaluna premises from the Hawaiian chiefs for a school, the purpose of which was to introduce and perpetuate the Christian religion and to educate

33 young men to become assistant teachers of religion, meaning that they should be educated in accordance with the tenets of the Calvinistic creed which then prevailed at the Andover Theological Seminary; that the school was established in 1831 and until 1849 carried on by the board in strict accordance with its purposes as above expressed, all of which was perfectly understood and appreciated by Richard Armstrong, to whom the letter of the com-

mittee was addressed, and by the other members of the Hawaiian government; that from the time of taking the school in 1849 until 1903 the Hawaiian government caused religious instruction to be given at the school as it formerly had been given, thereby showing its understanding that the agreement required this to be done. This understanding on the part of the government was further shown by a letter of October 29, 1864, of Attorney General C. C. Harris to the board of education advising that only those sects could control the school which taught the doctrines of each and all of the articles of the confession of faith and if the government was not willing to keep the conditions the property and improvements must be restored to the American Board; that the following year the board of education declared that "a full compliance with the agreement consists in appointment of persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, and if the board do not see fit to carry on the institution they must reconvey it or pay the sum of $15,000."

It is alleged that religious instruction at the school ceased in September, 1903, when the Territory made the school a technical school named the Lahainaluna Agricultural School. The cessation of religious instruction and of instruction in sound literature and solid science other than is implied in the teaching required at a technical and agricultural school is alleged to be a breach of the original agreement.

34 The plaintiffs contend that a practical construction has been placed upon the agreement by both parties, which is binding upon the defendant, conforming, as it does, to the objects for which the school was primarily established.

It is too late, they say, after both sides for over fifty years have acted upon the agreement as one which required that the government continue the previous course of religious instruction at the school, for the Territory now to restrict the meaning of the agreement to its precise language.

That the unwritten term above mentioned was by the parties themselves read into and made part of the agreement has been urged in the plaintiffs' argument and in their brief with great earnestness and evidently with profound conviction of its truth. In support of their contention they cite numerous decisions and extracts from text writers, including Lord Chancellor Sugden's remark, "Tell me what you have done under a deed and I will tell you what that deed means," which remark, it is said, "has come to be accepted as a maxim in the construction of contracts." *Chicago Ry. Co.* v. *N. P. Ry. Co.*, 101 Fed. 792. This was a case in which the court held that a contract between two railways, requiring one of them to keep and maintain in good order property in their joint use, included the expense incurred for flagmen, station agents, switch tenders and other employees whose services were necessary to the safe and orderly operation of trains running over the joint tracks, and especially as the expense had for ten years been paid by the company on monthly itemized statements, showing how both companies understood the contract and there being "no inconsistency between the terms of the

contract and the practice of the parties under it." We have not access to the report of the case in which the Sugden remark is said to have been made, *Drummond* v. *Att'y Gen.*, 3 Dr. & W. 165.

35 It appears from the report of the case on appeal, 2 Ho. Lords Cas. 186, that the court was required to say whether the expression "protestant dissenters," used in a deed of trust, included unitarians who had for a long time been treated by the trustees as within the meaning of the trust deed. Much evidence was received consisting in great part of historical documents, extracts from sermons and theological and controversial works published by the trustees, ministers of Dublin congregations, both prior to and after the foundation of the charity. There was further evidence "that the founders and original trustees and their successors for a long time were not merely trinitarian protestant dissenters, but that they had in various ways manifested the utmost abhorrence of unitarians and their doctrine." Lord Chancellor Sugden decreed that unitarians were not entitled to participate in the trust funds and that those of them who were trustees should be removed and others, trinitarians, appointed in their places. The decree was affirmed on appeal, the court saying, "It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them." Neither of these cases would authorize the admission of evidence to explain the meaning of words having an established, clear and unambiguous meaning. It is only with reference to ambiguous, uncertain or incomplete terms in a contract that the citations in the plaintiffs' brief apply, namely, that "a construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract." 1 Wharton, Contracts, Sec. 206.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence." *Topliff* v. *Topliff*, 122 U. S. 121.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influences." *Chicago* v. *Sheldon*, 9 Wall. 50.

36 "The great object and only foundation of all rules of construction is to come at the intention of the parties, and if the words or terms are equivocal, resort may always be had to the circumstances under which the contract was executed, contemporaneous constructions of the parties, as evidenced by their acts, and any subsequent acts showing how the parties understood their contract and what practical construction they put upon it." *White v. Amsden*, 67 Vt. 1.

"If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of

such evidence would be to contradict the legal effect of the language which the parties themselves have used."

2 Page, Contracts, Sec. 1111.

"If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight." Ib. Sec. 1126.

"Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof." Ib. Sec. 1130.

Thus it appears from many of the plaintiffs' citations that the rule of construction of contracts is not as broad as they claim.

The terms of the agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giving at least the amount of religious instruction included in morning prayers and in scriptural readings; no one familiar with this custom as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American Board and of the Hawaiian Mission as well it was requisite merely to restrict such instruction to the
37 inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like attorney general Harris, were members of the Protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of $15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the pos-

sibility of exciting antagonism in the legislature or in the cabinet of the King, they did not incorporate in the agreement the requirement which the plaintiffs say was intended to be agreed upon. This court has no right to take the agreement as meaning anything else than it clearly expresses.

We have preferred, before stating and discussing the de-
38 fendant's demurrer to the petition, to consider what the agreement was to which the demurrer applied. It follows from holding that there was no agreement for affirmative religious teaching but merely that no heterodox instruction should be allowed, that no breach of agreement resulted from ceasing to teach the prescribed doctrines. This amounts to sustaining the ground in the defendant's demurrer which claims that the petition sets forth upon that subject no cause of action. The grounds of the demurrer in substance are (1) that this court has no jurisdiction of the claim for damages; (2) that the United States, to whom the land has been ceded upon which the school is established, ought to be made co-defendant; (3) that no cause of action is stated, it appearing (*a*) that the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna seminary failing to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support," (*b*) that the right of action, if any, accrued upon the annexation in 1898, more than two years prior to the commencement of this action, (*c*) that no breach of any condition is shown, and (*d*) that if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible; (4) that the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

The first, second and fourth grounds and divisions *a*, and *b*, of the third ground of the demurrer are not sustained.

The question of the impossibility of the performance of the agreement presented by the demurrer relates to the provision in section 55 of the Organic Act, "nor shall any public money be appropriated for the support or benefit of any sectarian, denominational
39 or private school, or any school not under the exclusive control of the government," being in effect the same as the requirement of article 97 of the constitution of 1894, prohibiting public aid to sectarian or private schools. As we have held that there was no agreement to teach certain religious doctrines, the question does not arise of the effect of subsequent legislation and, in view of its importance, ought not to be passed upon obiter.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried

on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to literature. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

40 The plaintiffs say that an agricultural school, although scientific in character, "is a school primarily intended to the training of its students in the adaptation of certain selected branches of knowledge to a handicraft or industry; while incidentally the school probably does lead to the inculcation of some learning and knowledge, it would be knowledge or learning of a special character, the accomplishment of which in itself is not the purpose of the school. The purpose of the school is rather intended for the training of men for an occupation. This negatives the idea that it is an institution for the cultivation of solid science."

Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation. In considering the meaning of the agreement we derive no assistance from definitions of "literature" and "science" or from considering the various purposes of acquiring knowledge for general use or for use in specific work.

The literature taught in American schools fifty years ago did not include the literary courses of the present day; little more was taught which hinted at literature than reading, grammar and composition, the object being to acquire a habit of using the English, and at Lahainaluna the Hawaiian, language correctly. A technical school may or may not, according to its grade, require these studies, but a correct and intelligent use of language is as likely to be acquired in connection with technical studies as when made a separate subject of study. Probably Lahainaluna pupils obtained more proficiency in the use of language by their practical work in printing, which for many years was extensively carried on there, than by

41 theoretical studies.

In no way of looking at the subject which commends itself

to our judgment do we regard the agreement as violated by making this a technical school of agriculture.

The demurrer is sustained.

D. L. Withington and C. H. Olson, Castle & Withington and Smith & Lewis on the brief, for plaintiffs.

M. F. Prosser, Deputy Attorney General, for the Territory.

(Sig.) W. F. FREAR.
(Sig.) ALFRED S. HARTWELL.
(Sig.) A. A. WILDER.

Indorsement: Supreme Court Territory of Hawaii. F. J. Lowrey et al., Trustees, vs. Territory of Hawaii. Decision Filed Jan. 3, 1906. George Lucas, Clerk.

42 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
v.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Judgment.

This cause being heard this day upon the demurrer of the defendant to the plaintiff's amended petition and argued by counsel and the court, being fully advised in the premises, is of the opinion, and do therefore order, that said demurrer be, and the same is, hereby sustained.

And thereupon the plaintiff not asking to plead further, it is considered by the Court that the defendant go hence without day.

Dated, Honolulu, H. T. 3rd January 1906.

By the Court.

(S'g'd) GEORGE LUCAS, *Clerk.*

Endorsed and filed Jan. 12, 1906 as of January 3, 1906.

(S'g'd) GEORGE LUCAS, *Clerk.*

43 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,

v.

THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Appeal.

The above named petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, conceiving themselves aggrieved by the order entered on the 3rd day of January 1906, in the above entitled proceeding, do hereby appeal from said order to the Supreme Court of the United States, and pray that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Honolulu, H. T. 18th January 1906.

SMITH & LEWIS,
D. L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for Petitioners.

And now, to wit: On the 18th January 1906, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the within and foregoing appeal and citation and the receipt of a copy thereof admitted this 18th day of January, 1906.

M. F. PROSSER,
Deputy Att'y General, Attorney for the Territory of Hawaii.

(Endorsed:) Supreme Court of the United States. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, vs. The Territory of Hawaii. Appeal and Citation. Filed January 18, 1906 at 10:10 a. m. Henry Smith Clerk Supreme Court Ter. Hawaii, Castle & Withington Attorneys for petitioners.

44 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
TERRITORY OF HAWAII, Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, the Appellants in the above entitled action, and say that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That it was error to sustain the demurrer to the petition of the Appellants.

2. That it was error to sustain said demurrer and to render judgment against these Appellants and in favor of the Appellee.

3. That it was error to hold that in the contract between the mission and the Hawaiian Government there was no agreement for affirmative religious teaching but merely that no heterodox instruction should be allowed, and in holding that no breach of
45 agreement resulted from ceasing to teach the prescribed doctrines.

4. That there was error in failing to hold that the agreement that the said Institution shall be conducted at the expense of the Hawaiian Government as an institution for the cultivation of sound literature and solid science of itself was an agreement to continue that Institution upon the same principles and the same general character as it had previously been conducted, namely as an institution for the inculcation, amongst other purposes, of religion, and of the doctrines contained in the Confession of Faith annexed to the Agreement.

5. That it was error to hold that the terms of the agreement are not of doubtful import, since in case these terms do not import an absolute agreement to continue religious instruction of the character for the giving of which the school was founded, the terms at least are of such doubtful import as to require the evidence of the surrounding circumstances and the subsequent construction to control.

6. That it was error to hold that the practical construction placed upon this contract by the Government over a space of fifty years, and the uniform admission of the obligation to teach the doctrines specified, and the avoiding of the teaching of any other doctrines are not an admission of any obligation of the Government to teach such doctrines.

7. That it was error to hold that the conversion of the Institution into a Technical School under the name of the "Lahainaluna Agricultural School", in connection with the averment that the cul-

tivation of sound literature and solid science has ceased, does not allege a breach of the agreement.

8. That there was error in holding that the agreement to teach solid science and sound literature is not violated by
46 teaching solely that literature which is limited by the study of science, or the science of agriculture.

9. That there was error in holding that an agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture exclusively.

10. That there was error in holding that a school primarily intended for the training of its students in the adaption of certain selected branches of knowledge to a handicraft or industry is a school of learning as well as a school of art within the meaning of the agreement.

Wherefore the said Appellants, Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, pray that the order of the said Supreme Court of the Territory of Hawaii, made in the above entitled action on the 3rd day of January, 1906, sustaining said demurrer and rendering judgment for the Territory of Hawaii be reversed, and that the Supreme Cout of the Territory of Hawaii be ordered to overrule the respondent's demurrer to the petition in said action.

(Sg.) SMITH & LEWIS,
(Sg.) DAVID L. WITHINGTON,
(Sg.) CASTLE & WITHINGTON,
Attorneys for Petitioners, Appellants.

Endorsed: In the Supreme Court of the United States. Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees Appellants, vs. Territory of Hawaii, Appellee. Assignment of Errors. Filed January 18, 1906 at 10:10 a. m. Henry Smith, Clerk Supreme Court Ter. Hawaii. Castle & Withington & Smith & Lewis, Attorneys for Petitioners, Appellants.

47 Mr. Justice McKENNA delivered the opinion of the Court.

The contentions of the parties are sharply in opposition as to the agreement and the necessity and competency of extrinsic evidence to explain it. Appellee contends that we are confined to the letter of the agreement, and so confined its conditions have been fulfilled. In other words, that "sound literature and solid science" are still cultivated, and that no religious tenet or doctrine contrary to those heretofore inculcated by the Mission is taught. Or, to express the contention in language other than that of the agreement, that a school devoted to one subject of secular science and which excludes all religious teaching was contemplated by or is permitted by the agreement. Opposing these views, appellants contend that a mere technical school does not fulfill the agreement; that the terms of the agreement require the "inculcation of general learning and knowledge," accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government. And, it is insisted, that if there is anything doubtful in the agree-

ment, it may be interpreted by the circumstances which preceded it and the immediate and long-continued practice under it. If we may resort to those circumstances and that practice there cannot be a shade of doubt as to the intention of the parties. It is insisted, however, by the appellee that the agreement is clear and unambiguous and that it does not present a case for the resort to extrinsic evidence. We cannot concur with this view. There is quite a range of meaning in the words "sound literature and solid science." To interpret or specialize them and make definite application of them would certainly receive aid from the practice of the parties. It is contended by appellant that there was a close connection between them and the "definite system of doctrine" which was the "central purpose of the Mission." We, however, need not dwell further upon this contention, though a plausible argument has been advanced
48 to sustain it, and we pass to the next controverted contention.

The words of the agreement are that the government "shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission, a summary of which will be found in the confession of faith herewith enclosed * * *" Were these words all there was of prohibition and purpose as to religion? May we believe that it became suddenly the purpose to change an institution which had had its impulse and foundation in religious zeal to convert the Hawaiians to Christianity and to educate young men to be "teachers of religion," to one simply literary and scientific and nonsectarian? Had the belief of the Mission in its form of Christian faith become so indifferent that it would transfer a seminary instituted for the propagation of that faith with no other condition than that contrary tenets should not be taught? There is not a syllable in this record to justify such assumptions. It must be remembered that we are considering a transaction which occurred in the Hawaiian Islands in 1849, and by the conditions of that time were the acts of the parties induced. Besides, the agreement is not in a formally executed paper. It is found in a correspondence, and is constituted and explained by the whole of the correspondence. And taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose.

The Mission reminds the Minister of Public Instruction that the seminary was established in 1831, "to promote the diffusion of enlightened literature and Christianity throughout the islands," and that it had been unceasingly watched over, cherished and cared for by the Mission, and that $77,000 had been expended for its benefit. It was stated that in consequence of debts incurred "in the prosecution of its labors of benevolence and mercy" the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the Missions under its care, including
49 the Hawaiian mission, and that the latter for that reason would be "unable to carry forward its operations with the vigor to be desired in all of its departments of labor." In view of these facts, it was stated and believed that under the circumstances the transfer of the institution "to the fostering care and patronage

of the government" would "promote the highest interest of the Hawaiian people." An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was enclosed. The government modified the proposal by reserving the right to pay $15,000, as an alternative to the reversion of the property to the Mission if the government should not fulfill the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted to that originally proposed. The following are the reasons which were given:

"The reasons for requesting the substitution are, that the previously presented confession, although according in all its specified doctrines with our belief and with that also of the churches by whom that institution has been founded and sustained, is yet not so distinctive, as to present a barrier to the introduction there, of other deleterious doctrine not specified in said confession. It will admit, also, of teachings of this Mission and of the churches sustaining it, such as we feel to be entirely subversive of evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain."

The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be "still more definite and of equal or greater importance," that is, "to educate young men to be Christian ministers." A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its "fostering care and patronage." And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered.

50 Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be. In *Bradley* v. *W. A. & G. Packet Co.*, 13 Pet. 89, a contract expressed in a correspondence between the parties for the hire of a steamboat, an exception was engrafted which was not expressed, upon evidence that the owner of the boat knew the service for which it was intended, and that when navigation was obstructed by ice another mode of transportation was resorted to. The court said, as to extrinsic evidence it was applied in some cases "to ascertain the identity of the subject; in others its extent. In some, to ascertain the meaning of a term, where it had acquired by use a broad meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same. To ascertain by this medium of proof the intention of the parties, where without the aid of such evidence that could not be done, so as to give a just interpretation to the contract." And it was expressed "as the just result" of the cases, "that in giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made; whenever without the aid of such evidence, such applica-

tion could not be made in the particular case." In *Brooklyn Life Insurance Co.* v. *Dutcher,* 95 U. S. 269, it was said: "There is no surer way to find out what parties meant than to see what they have done." So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The
51 conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration, the following: *Reid* v. *Merchants' Mutual Insurance Co.,* 95 U. S. 23; *District of Columbia* v. *Gallagher,* 124 U. S. 505; *Topliff* v. *Topliff,* 122 U. S. 121, *Paige* v. *Banks,* 13 Wall. 608; *Philadelphia R. R. Co.* v. *Trimble,* 10 Wall. 367; *Chicago* v. *Sheldon,* 9 Wall. 50; *Carazoo* v. *Travano,* 6 Wall. 733; *Simpson* v. *United States,* 198 U. S. 397, 399; *Chicago Great Western Railway Co.* v. *Northern Pacific Railway Co.,* 101 Fed. Rep. 792. And many State cases could be cited.

The design of studies for the school we have detailed. The government recognized and continued both without question or change in any way. The seminary buildings were burned down in 1862. The government rebuilt them and continued the school. The petition alleges that the principal of the school in 1862-3 in his report said: "The Hawaiian government has always been a liberal friend and benefactor * * * Never in any way have they interfered with our manner of instruction or in the course of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

In 1864 new interests appeared and a change in the purpose of the school commenced to be urged. It was met by an adverse opinion of the Attorney General, who pointed out the conditions of
52 the transfer and the condition of their nonfulfillment to be the restoration of the property to the A. B. C. F. M. And, again, in 1865, the board of education, while denying the right of the Mission to nominate instructors, conceded the obligation to continue the institution, "so as to aid, instead of defeating, the purpose for which it was founded," and the alternative to be the surrender of the property or the payment of $15,000. "Religious instruction," it is alleged, "upon the lines formerly pursued by the Mission and subsequently by the government, in accordance with the agreement, was continued up to or about September 1, 1903." We hence see that not only the immediate practice of the government construed

the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning—proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

It is no defense that the government's policy has changed. It cannot so release itself from its engagement. The provision for the teaching of "sound literature and solid science" might be considered of "expansive character," to use the description of Lieber, and change with the progress of both. The provision for religious teaching is unchanging. It is as definite and absolute today as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000.

Judgment reversed and case remanded, with directions to proceed in conformity with this opinion.

Mr. Justice Brewer took no part in the decision of this case.

53 In the Supreme Court of the Territory of Hawaii.

October Term A. D. 1905.

September Session A. D. 1907.

FREDERICK J. LOWREY, GEORGE CASTLE, and WILLIAM O. SMITH, Trustees, Petitioners,

vs.

THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Answer of Defendant.

Now comes the Territory of Hawaii, by Charles R. Hemenway, Attorney General of the Territory of Hawaii, and for answer to the Petition herein, denies each and every, all and singular, the matters, allegations and things set forth in said Petition, and said defendant hereby gives notice that it will rely in making its defense inter alia on the statute of frauds.

Dated Honolulu, this 14th day of September, A. D. 1907.

THE TERRITORY OF HAWAII,
By C. R. HEMENWAY,
Attorney General of the Territory of Hawaii.

Indorsement: Supreme Court Territory of Hawaii. Oct. Term, 1905. Sept. Session, 1907. Frederick J. Lowrey, George Castle & Wm. O. Smith, Trustees, Petitioners vs. Territory of Hawaii, Respondent. Answer of Defendant Filed September 14, 1907, at 12 o'clock Noon. J. A. Thompson, Clerk. C. R. Hemenway, Att'y Gen'l, For Respondent.

54 In the Supreme Court of the Territory of Hawaii.

FREDERICK J. LOWREY et al., Trustees of the A. B. C. F. M., Petitioners,
vs.
TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Plaintiffs' Motion for Judgment.

Now comes the plaintiffs, and, upon the record in this case and upon the judgment of the Supreme Court of the United States herein rendered, moves that judgment be entered for the said plaintiffs and against the said defendant, as in plaintiffs' petition prayed for.

Dated, Honolulu, February 17, A. D. 1908.

CASTLE & WITHINGTON,
SMITH & LEWIS,
C. H. OLSON,
Attorneys for Plaintiffs.

Service upon me of a copy of the foregoing motion is hereby admitted.

(Sig) C. R. HEMENWAY,
Attorney General of the Territory of Hawaii.

Indorsement. Original — No. — Supreme Court, Territory of Hawaii. Frederick J. Lowrey, et al., Petitioners, vs.
55 Territory of Hawaii, Respondent. Plaintiffs' Motion for Judgment. Filed February 18, 1908, at 2:35 P. M. as of February 17, 1908, J. A. Thompson, Clerk. Castle & Withington, Smith & Lewis C. H. Olson, Attorneys for Plaintiffs.

56 In the Supreme Court of the Territory of Hawaii.

October Term, 1907.

Extract of Clerk's Minutes.

Monday, February 17, 1908.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

No. 5. Vol. 2, pp. 453–454.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees,
vs.
THE TERRITORY OF HAWAII.

Original.

Hearing on Motion by Defendant to Amend Answer.

Appearances:

W. R. Castle, D. L. Withington and C. H. Olson for Plaintiffs.
Hon. C. R. Hemenway, Attorney General and M. F. Prosser for the Territory.
Kate Kelley, Stenographer.

The above entitled motion having been noticed for 10 A. M. this day, upon its being called Mr. Withington rose and stated that they desired to interpose an objection to the motion.

Mr. Hemenway here rose and argued in support of the motion.

Following Mr. Hemenway, Mr. Withington rose and argued opposing the motion and during the course of his argument stated his objection to the motion upon two points, to wit:

(1) That in view of the decision of the United States
57 Supreme Court the fact that the statute of limitations was raised in the answer originally filed that no further answer be filed without obtaining the permission of the appellate tribunal, that is, the United States Supreme Court,

(2) That the Supreme Court of the United States has in this case disposed of the statute of limitations in the last clause of the opinion, to wit: "The provision for religious teaching is unchanging. It is as definite today as it was when it was written. The alternative of the agreement has made the return of the property conveyed, or the payment of $15,000.00."

Mr. Withington resumed with his argument concluding at 10:8 A. M.

Mr. Hemenway here asked the Court that the name of M. F. Prosser be entered as associate counsel for the Territory.

Granted by the Court.

At 10:9 A. M. Mr. Prosser made a brief reply argument on the motion.

The Court ordered the motion denied.

Mr. Withington here orally moved for judgment on the ground that the decision of the Supreme Court of the United States disposes of the whole case, and that if it is desirable to interpose any further or additional answer that application should have been made in that Court; Mr. Withington further objected to the introduction of evidence on the same ground.

The Court here asked Mr. Withington to file a written motion, to which he replied assuring the Court that he will file such motion,

and thereupon the Court denied the plaintiffs' motion for judgment.

Mr. Withington noted an exception to the ruling of the Court denying the motion for judgment, and then proceeded to offer from Volume 2, Foreign Testimony, on page 19, the land
58 claims of the Mission of the American Board of Lahainaluna, Island of Maui.

59 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees,

v.

THE TERRITORY OF HAWAII.

Original.

Tried February 17-21, 1908. Decided July 1, 1908.

Hartwell, C. J., Wilder and Ballou, JJ.

Contracts—construction of condition.

A condition attached to the transfer of a school that the grantee shall not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the grantor and summarized in the correspondence, is not, as interpreted by surrounding circumstances and subsequent practice, broken by a course of study including morning and evening prayer, compulsory attendance at Sunday school with preparation of the International Sunday school lessons, and compulsory attendance at Christian Endeavor exercises.

Contracts—construction of condition.

A condition that a school shall be continued as an institution for the cultivation of sound literature and solid science is satisfied by a curriculum including classic and modern literature, geography, physiology, history, agriculture, arithmetic, book-keeping, algebra and geometry.

Deeds—construction.

A claim for a liquidated sum of money, arising as an alternative from the refusal of a third party to convey land upon condition broken, is not assigned by a previous conveyance of all lands in or to which the grantor has any claim or demand.

Opinion of the Court by Ballou, J.

The plaintiffs brought an action against the Territory under R. L. Sec. 2000 to recover the sum of $15,000, alleging a breach by the Territory of an agreement made in 1849 between the King-
60 dom of Hawaii and the American Board of Commissioners for Foreign Missions, the petitioners claiming to be successors of the board; the agreement in effect being that in consideration

that the American Board would relinquish to the government its claim to certain land at Lahainaluna and transfer to the government the seminary buildings, furniture, books and apparatus therein, the government would continue the seminary at its expense as an institution for the cultivation of sound literature and solid science and would not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the mission and expressed in the confession of faith, a copy of which is attached to the petition; that in case of nonfulfillment of the conditions of the transfer, the property should revert to the Hawaiian Mission, to be held in behalf of the American Board or the government should at its option pay the sum of $15,000.

The breach of this agreement alleged is that since 1903 the Territory has changed the institution to an agricultural school and taught no religious doctrine whatsoever, nor sound literature nor solid science.

The defendant's demurrer to the petition, based on several grounds, was sustained on the ground that no condition was made which required the government to give religious instruction, but merely that no religious tenet or doctrine contrary to those theretofore inculcated by the mission as set forth in a certain confession of faith should be taught; and that the agreement to teach sould literature and solid science was not broken by a failure to teach those branches of learning otherwise than they would be required to be taught in a technical school and a school of agriculture. *Lowrey v. Territory*, 17 Haw. 225.

Upon appeal to the United States Supreme Court the judgment on the demurrer was reversed on the ground that in view of the circumstances and conditions which preceded the contract and
61 the construction placed upon it by both parties, as set forth in the petition, the agreement required the giving of religious instruction "upon the lines formerly pursued by the mission and subsequently by the government." *Lowrey v. Hawaii*, 206 U. S. 206, 223. The cause, having been remanded with directions to proceed in conformity with the opinion, has been heard upon a large amount of documentary and other evidence. The court has also referred to proceedings of a public nature of which it would ordinarily take judicial notice, and to documents from the public archives when specifically referred to in the exhibits on file.

The institution at Lahainaluna, originally called the High School and afterwards the Missionary Seminary, was founded by the missionaries of the American Board in 1831. From that date until 1849 it was the most notable of the educational institutions founded by the missionaries who, with all their intense theological convictions, still devoted the greater part of their lives to the secular education of an entire nation. The early years of the school were, however, marked with many vicissitudes. Cheever, Sandwich Islands 201, Plaintiffs' Ex. 21. The accounts of the seminary from missionary sources are usually laudatory while those of independent observers are far less flattering. Commodore Wilkes who visited the seminary in 1841, and who is regarded as an unprejudiced observer

from the missionary standpoint (Cheever, Sandwich Islands 301, Plaintiffs' Ex. 21), reports:

"In all the departments of this establishment I saw nothing but ill directed means and a waste of funds that might have been avoided by proper forecast, and a full examination of the subject by practical men. The school has passed its meridian and is now fast going to decay, a fact which must strike every one on a casual visit." 4 Wilkes, United States Exploring Expedition, 247.

Whatever may have been the hopes of the founders of the seminary the internal testimony of subsequent years shows that
62 the above criticism was well founded. In 1848 the principal's report personifies the seminary as follows: "Though she tries to keep up an appearance of her former greatness and seems sensible of the fact that she is less admired than formerly yet she stands at her post and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her." Report for two years ending May, 1848, Plaintiffs' Ex. 25.

During the next winter studies at the institution were practically broken up by sickness in the principal's family followed by successive epidemics of measles, influenza and whooping cough. School operations were suspended in February and no new class entered pending action of the general meeting of the mission. The report for that year says:

"A new class, according to custom, should be entered this year. It has not been called for yet by us because we thought it best first to hear what changes will actually be decided on by the mission at this meeting. The late unparalleled diminution of population may have also some effect in modifying the views of the mission in regard to this school and render it expedient in their minds to alter its operations or the number of its scholars, these with other reasons induced the teachers to defer the calling of another class until after this meeting of the mission.

"If it is decided by the mission to call a new class we wish to present a few considerations to the brethren to guide them in their selections. Many thousand dollars of money have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class when they felt there were enough in the nation that would do honor to their training at the seminary." Report, June, 1848, to April, 1849, Plaintiffs' Ex. 26.

63 Besides these conditions and the emigration to the gold fields of California, also referred to in the report, the general meeting had to face an embarrassed condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From report of committee, April 25, 1849, Plaintiffs' Ex. J.) It was under these circumstances that the offer of transfer to the Hawaiian government was made.

The proposal of transfer, under date of April 25, 1849, was upon

the express condition "that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science, and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government by the said Island Mission shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." The entire letter is set out in *Lowrey v. Hawaii*, 206 U. S. 206, 209.

The confession of faith sent with the letter is evidently, as alleged in plaintiffs' declaration, a printed profession of faith, which, as introduced in evidence (Plaintiffs' Ex. J), is endorsed "Certificates of Church Membership," and reads as follows:

"The Lord Jehovah our Creator has given to the world a law which is holy just and good, that we should love him with the whole heart, and glorify him in all that we do.

"This law I have often broken, and have made myself ex-
64 ceeding sinful in his sight. Now I hate my sins, I repent of them, and renounce them. God so loved the world that he gave his Son that whosoever believeth in him should not perish but have everlasting life. He has invited me to come to him. This I have resolved to do, and to devote myself to his service. I adore his rich grace in calling me to the feast of the gospel. I do now hope for a part in the blessings of his wonderful redemption. I desire to do what I can to promote his glory and the salvation of my fellow men, and I feel it to be a duty and a privilege to take on me the vows of his everlasting covenant.

"I do therefore in the presence of God and before the world, make a solemn declaration of my faith.

"1. I believe in Jehovah;—that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is every where present and sees all things; that in power and wisdom, and goodness, in all perfections and excellences he is infinite; that he made the earth and the heavens, men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure; that he alone is God and that all beside him that are called gods are vanity and the work of errors.

"2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

"3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that con-

sequently all mankind of every generation are naturally in a state of corruption, guilt and death.

"4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his Son into the world, made of a woman and in the likeness of man.

"5. I believe in the Lord Jesus Christ: that he is the Son
65 of God; that he died upon the cross as a propitiation for our sins, and for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justification unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the king of Zion, has all power in heaven and earth, and will judge the quick and the dead.

"6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

"7. I believe that in all ages, Jehovah has had a church in the world, in which he has graciously dwelt, and which he designs to establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

"8. I believe in the resurrection of the body; in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

"Dedication and Covenant.

"And now in conformity with these sacred and momentous truths, and in the presence of angels and men I make a solemn dedication of myself and of my all; avouching this day, the Lord Jehovah, Father, Son and Holy Ghost, to be my God, my Father, my Savior, my Sanctifier, and humbly giving up myself to him my chosen portion, to be his, and only his forever. I acknowledge my everlasting and indespensible obligation to glorify God in all the duties of a holy life according to his word. Depending on his all sufficient grace I engage to walk as a christian in the faith
66 and order of the gospel, conscientiously attending the worship of God, in secret, in family, and in public,—upon the sacraments of the New Testament, Baptism and the Lord's supper, and the discipline of his kingdom. I do solemnly covenant to walk with God's people, to watch over them, and submit to their Christian watch and care, to let my light shine before men, and to seek the glory of God in promoting their happiness and salvation.

"Having confessed my sins, before this church and made a public profession of my faith in Jesus Christ, and with their consent taken on me the vows of his everlasting covenant, and solemnly engaged to be the Lord's, and to walk with his people as a Christian, and as a citizen of Zion, I desire moreover to unite fully with

this particular church, and have my name enrolled with theirs, and as one of their members to enjoy their privileges, and to engage with tnem in the service of God our Savior.

"Honolulu, Sandwich Islands."

The government replied under date of April 27, 1849, accepting the proposals subject to ratification by the legislature and with the following proviso:

"Provided, that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions & improvements which may have been made upon the premises, & all rights & privileges connected therewith, to revert to the said Mission, to be held in behalf of the Am. Board of Com. for Foreign Missions, or to pay the sum of $15,000. Provided also that in case this Government shall find it expedient to divert this establishment to other purposes than those of education it shall be at liberty to do so, on condition that it sustain an institution of like character, and on similar principles in some other place on the Islands or pay the sum of $15,000
67 to said Mission. in behalf of the Mission Board in Boston."

These additional proposals of the government were accepted by the mission under date of April 28, 1849. On May 8 the mission proposed a substitution for the previously presented confession of faith, which was accepted by the government in the following correspondence:

HONOLULU, *May 8th*, 1849.

"To his Ex. R. Armstrong, Minister of Public Instruction of His Hawaiian Majesty.

SIR: Being instructed by the American Mission in their General Meeting lately adjourned, we would, as their Comtee. most respectfully present for your consideration, the Confession of Faith within enclosed, as a substitute for the one given with the Articles of agreement, transferring the Mission Sem. at L-luna to the Hawaiian Government.

The reasons for requesting the substitution are, that the previously presented Confession,—although according, in all its specified doctrines, with our belief, & with that also of the churches by whom that Institution has been founded & sustained,—is yet not so distinctive, as to present a barrier to the introduction there of other & deleterious doctrines not specified in sd. Confession. It will admit also of teaching in that Seminary, views entirely at variance with those of this Mission & of the churches sustaining it; such as we feel to be entirely subversive of Evangelical Christianity.

Not doubting but that these reasons will commend themselves to the members of His Majesty's Gov't we beg leave to express, in presenting them, the high consideration with which we remain
68 Your Ex. most sincere Friends & Obed'nt Servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,

Comte."

"We Believe,

"1st. That there is one only living & true God, the creator, preserver, & Governor of the Universe; a Being self-existent, independent, & Immutable, infinite in power, wisdom, justice, goodness, mercy & truth.

"2d. That the Scriptures of the Old & New Testaments were given by inspiration of God; that they contain a complete & harmonious system of Divine truth, & are the only perfect rule of Christian faith & practice.

"3d. That God is revealed in the Scriptures as the Father, the Son & the Holy Ghost, & that these three are one, &, in all Divine attributes, equal.

"4th. That God made all things for himself; that he governs all things according to the counsel of his own will, & that the principles & administration of his government are holy, just & good.

"5th. That our first parents were originally holy; that they fell from that state by transgressing the command of God; & that, in consequence of their apostacy, all their descendants are without holiness, & alienated from God, until their hearts are renewed by Divine Grace.

"6th. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, & death, made an atonement for sin, on account of which pardon & salvation are offered to all who truly repent & believe in him; & that all who will, may come & take of the water of life freely; but, that such is the aversion of man to these terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit.

69 "7th. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be holy & without blame before him in love; & that they should be saved, not by works of righteousness which they have done, but according to the distinguishing mercy of God, through sanctification of the spirit, & belief of the truth.

"8th. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto salvation.

"9th. That there will be a general resurrection both of the just & of the unjust; & a day of judgment, when all must give account to Christ of all the deeds done in the body: when the impenitent will go away into punishment, & the righteous into life, both of which will be without end.

"10th. That the Lord Jesus Christ has a visible church in this world; that the terms of membership are a credible profession of faith in Christ, & of that holiness which is wrought by the renewing grace of God: that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper & that only they & their households can be admitted to the ordinance of Baptism."

"OFFICE OF PUBLIC INSTRUCTION, *May 24th*, 1849.

"To Rev. Wm. P. Alexander, Rev. C. B. Andrews & S. N. Castle, Esq.

"GENTLEMEN: Your letter of May 8th, enclosing a confession of faith, which your request may be substituted for the one accom-

panying your letter of the 25th of April, has been received, & I have only to state that the request is granted, & the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot
70 be done until the transaction is ratified by the American Board, & the Legislature of the Islands.

Very respectfully,
Your humble servant,

R. ARMSTRONG,
"Minr. of Pub. Instruction."

The proceedings were ratified by the Hawaiian legislature and in March, 1850, the mission transmitted the following ratification of the prudential committee:

"HONOLULU, *March*, 1850.

"D. SIR: On behalf of the committee acting for the Mission in the interim of Genl. Meeting I beg leave for the information of His Majesty's Government to communicate to you the following Resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Missions on the 21st of August 1849, viz:

"Resolved, That the agreement entered into by the Sandwich Islands Mission in April last transferring the Seminary at Lahainaluna in the Sandwich Islands to the Government of said Islands on conditions stated in a letter from the Mission to the Minister of Public Instruction dated Honolulu April 25, 1849, and in a letter from the Minister of Public Instruction dated April 27, 1849, be approved by the Prudential Committee & that the Secretary having charge of the foreign correspondence give immediate information of this fact to the Mission.

"Very respectfully,
"Your friend & Servt.,

"SAML. N. CASTLE.

"To His Ex. R. Armstrong, Minister of Public Instruction of the Haw'n Gov't.

It is worthy of note that the prudential committee do not appear to have been advised of the Substitution of the written confession of faith for the printed profession of faith. Not only is this
71 shown by the dates of the correspondence referred to in their resolution, but the original letter transmitting this resolution from Rufus Anderson, secretary of the A. B. C. F. M. dated September 18, 1849, acknowledging receipt of letters in detail (Plaintiffs' Ex. 1), makes no mention of any letter which by date or otherwise refers to the substitution. After the close of the evidence the court requested the attorneys for the plaintiffs to furnish a copy of the report of the American Board for 1849, in which the correspondence before the Board, set out on pages 239 et seq., ends with the letter of April 28, 1849.

While previous to the establishment of the land commission there were no private titles to land in the Hawaiian Islands and while the failure of the American Board to obtain an award for the property in question left the title in the Hawaiian government (Act establishing land commission, Sec. 8 R. L. p. 1163), there can be no doubt that the relinquishment of the claim of the American Board and the transfer of the personal property constituted valid consideration for this agreement. Nor can we sustain the claim of the Territory that its expenditure of money for improvements with the knowledge of the plaintiffs of existing conditions, both prior and subsequent to the alleged breach, constitutes an estoppel. The only serious questions at issue are whether there has been a breach of the contract in question; if so, whether this action is barred by the statute of limitations; and whether the deed from the American Board to the plaintiffs gives them the right to maintain this action.

No evidence was offered or attempted to be offered on behalf of the plaintiff to sustain the allegation that religious instruction upon the lines formerly pursued by the mission was continued up to September 1, 1903, or that it ceased to be part of the curriculum on or about that date. In place of proof upon this point the plaintiffs offered the testimony Sereno E. Bishop as to the course of
72 instruction during his incumbency as instructor and principal at Lahainaluna from 1865 to 1877, and then the testimony of Mr. MacDonald, the present principal, as to the course of instruction after September 1, 1903, leaving the intervening years wholly without offer of proof. As a result of this procedure they claim to have thrown upon the Territory the burden of overcoming the presumption that the state of things testified to by Dr. Bishop continued throughout the period upon which no testimony was offered, or at all events that having shown, as they claim, an alleged breach existing on or about September 1, 1903, the burden of proof was on the government to show that the breach had occurred before that time if it wished to take advantage of the statute of limitations. In further accordance with this theory of the burden of proof the plaintiffs practically refrained from all cross examination of the graduates of Lahainaluna, called by the government, whose attendance covered the period in question, although in each instance the government asked concerning the religious instruction, and at the close of this testimony advanced the further claim that the government had failed to ask the direct question as to whether the particular doctrines enumerated in the confession of faith had been taught.

It would be highly unsatisfactory to have to determine a question of this kind, where ample testimony is available, upon considerations relating to burden of proof and presumptions. We are not driven to a consideration of these questions, however, because the documentary and oral evidence finally presented gives a comprehensive view of the entire course of instruction from the foundation of the institution to the present time.

One of the avowed objects of the early founders of the seminary was the education of young men to become ministers, yet there is

no evidence from which we can find that at any period the institution was a theological seminary in the sense that it prepared
73 its graduates for immediate service in the ministry. The "Laws of the High School" of June, 1835, extracts from which are attached to the declaration, were presented by the directors to the mission as "a more definite and enlarged plan of operation such as they supposed from actual experiment to be practicable." (Plaintiffs' Ex. K, p. 147.) The curriculum is described as "the course of study to be introduced as soon as practicable." (Plaintiffs' Ex. K, p. 153.) In 1842 the general meeting, in response to an animated appeal from the American Board on the subject of theological education, resolved that "it is inexpedient at present to attempt anything in the form of a theological school or seminary for the whole islands; but that it be recommended to the brethren of each island to confer together on this subject, enter upon the work as individuals, or where practicable designate one of their number, to devote such a portion of his time as he and they may deem proper to a class in theology." Minutes general meeting, 1842, p. 29 (Plaintiffs' Ex. M, Defendant's Ex. 35).

Jarves writing of the seminary in 1843 says: "This institution has already supplied an abundance of teachers well qualified for the common schools; and it is designed eventually to educate the most promising youth to form a native clergy." Jarves, Scenes and Scenery in the Sandwich Islands, p. 177 (Defendant's Ex. 33). In 1847 the design is still "eventually" to be carried out. Bingham, Sandwich Islands, p. 424 (Plaintiffs' Ex. 22).

The curriculum of the school in 1846 is given as follows:

"The branches taught in the school are Sacred Geography, Universal Geography, History, Sacred and Profane, Hawaiian Grammar, Algebra, Geometry, Trigonometry, Navigation, Mensuration, Surveying, Linear Drawing, Sacred Music, and a variety of miscellaneous branches." Report Minister Public Instruction 1846, p. 52, Plaintiffs' Ex. 19, Defendant's Ex. 1.

74 After the transfer to the government the institution continued to be primarily for the education of teachers (Report Minister Public Instruction 1850, p. 26; Report President Board of Education 1872, p. 4) from the middle classes of the Hawaiian people (Report President Board of Education 1866, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: "A year spent in theological study with a missionary is thought sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, The Hawaiian Islands, p. 189 (Plaintiffs' Ex. 23).

The curriculum of the seminary underwent little change between the years 1849 and 1877. The following extracts from the reports in evidence are sufficient to indicate the course of study:

"Their studies have been as follows: Algebra, Geometry, Trigonometry, Surveying, Navigation, Natural and Revealed Theology, Natural and Moral Philosophy, Anatomy, Hawaiian Laws, Chro-

nology, Sacred Geography, Sacred History, Geography, Composition, Punctuation and Music."

Report Minister Public Instruction 1852, p. 40.

"The following is the course of study pursued by the several classes:

"Fourth or Freshman Class.

"Arithmetic, Geography, Chirography, Punctuation, English Language, Ancient History, Natural History, Chronology, Bible History, Chronology and Geography of the Bible, Hawaiian History.

"Third Class.

"Hawaiian Constitution, Bookkeeping, English, Anatomy, Algebra.

"Second Class.

"Geometry, English Language, Political Economy, Church History, Evidences of Christianity, Natural Theology, Moral Philosophy.

75 "First or Graduating Class.

"Trigonometry, Surveying, Navigation, Natural Philosophy, Optics, Astronomy, English Language, Theology.

"Compositions, debates and declamations are required through the whole course."

Report President Board of Education 1862, p. 8.

In 1863 the American Board withdrew from active work in the Hawaiian Islands, and the Hawaiian Mission was reorganized as a self supporting institution under the name of Hawaiian Evangelical Association. The American Board continued to maintain, and still maintains, a fiscal agent whose chief duty in later years has been the payment of salaries to such of the original missionaries as are still living.

During the next two years the history of Lahainaluna was twice reviewed in public documents, and these are relied on by the plaintiffs as supporting their construction of the contract.

In 1864 the board of education laid before Attorney General Charles C. Harris copies of the documents relating to the transfer of the seminary. The declaration avers that this was in answer to a proposal to change the form of religious instruction, but there is no evidence of this, the attorney general himself saying, "I scarcely know on what point or points I am required to give an opinion." He advises the board of education that a deed of conveyance should have been made yet that no one now can dispossess the government if it shall keep the conditions of the transfer. He quotes the conditions and gives his opinion that the original confession of faith as far as it goes does not differ in anything from what is taught in the Roman and Anglican churches by Methodists and probably some others. He then refers to the proposal of a sub-

stituted confession of faith, which, judging from the nearness of the date from the 8th of May to the 29th of April, he assumes was before the Prudential Committee in Boston and therefore
76 the one of binding effect. The allegation in the declaration that he "refers to the substitution of the second confession saying that it is a much stronger instrument" is unsupported by the letter. On the contrary the attorney general says that the substituted confession differs from the first in no essential particular except the last article ("last three lines" written in the margin). These lines relate to the right to partake of the Lord's Supper, and the attorney general argues that these are unessential as articles of the Christian faith. He then concludes, "Should the government not be willing to keep the conditions as far as I have shown them (see p. 8) the property, and improvements must be restored to the A. B. C. F. M."

This opinion gives us no material assistance in construing the terms of the transfer nor does the recent opinion of an assistant attorney general also introduced by the plaintiffs throw much additional light. On March 31, 1903, Philip L. Weaver, assistant attorney general, rendered an opinion to the chairman of the senate committee on public lands. The principal points made are that the condition of the trust as to religious teaching being negative, the government is "not compelled to teach any religious doctrine whatever, and therefore in my opinion cannot be held to be a sectarian institution."

In 1865 a controversy arose over the right of nomination of teachers for the institution. Samuel N. Castle, agent of the A. B. C. F. M. having urged the board of education to fill a vacancy and having submitted a list of names which "would be entirely acceptable to the A. B. C. F. M. in case they should be preferred by his Majesty's government to the nominee already named (Plaintiffs' Ex. 2, April 18, 1865), the board of education inquired whether Mr. Castle implied that the board had not "full liberty to select the masters in question without reference to any other authorities, and if so to state the nature of the ground on which any such
77 claims to interfere with the internal management of the said school appeared to be founded." (Plaintiffs' Ex. 5, June 9, 1865.) Castle replied at length, giving his views not only upon the question immediately in issue but upon the general construction of the contract. He admitted that literally construed the terms of the conveyance gave no right of nomination and the American Board had no right to interfere until something has been taught in the institution contrary to the confession of faith, but claimed that the instrument was defective in not explicitly recognizing a ratifying or nominating power in the American Board, and that the appointment of any man not acceptable to the A. B. C. F. M. to the post of teacher in the institution would be violation of the whole spirit of the agreement. (Plaintiffs' Ex. 6, June 13, 1865.)

The board of education replied that it inferred from the letter that the claim might still be advanced that the board had not full liberty to select the masters in question without reference to other

authorities and stated that it was of an entirely different opinion. In its view "a suggestion from those representing the founders of the institution is entitled to a respectful and courteous consideration but they desire it to be distinctly understood that a right of nomination does not exist, is not hinted at and was not intended to be reserved on the one side or granted on the other." The board disclaims any desire to defeat the purpose for which the institution was founded "or introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders."

Referring again to the claim of the right of nomination the board "wholly and unequivocably dissent. They are of the opinion that a full compliance with the agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, but the acceptability or the contrary of the person appointed to the
78 A. B. C. F. M. forms no part of the contract either in letter or in spirit." The board nevertheless appointed Sereno E. Bishop, the original nominee of Mr. Castle. (Plaintiffs' Ex. 7, June 30, 1865.)

In 1877 occurred a vital change in the management and instruction of the seminary. This arose from the substitution of English for Hawaiian as the medium of instruction. The consequences are foreshadowed in a letter from Dr. Bishop recommending the change as follows:

"To Hon. C. R. Bishop, President of the Board of Education, Honolulu.

"DEAR SIR: In accordance with your request, I have the honor to present my views on the expediency & practicability of adopting the English language as the medium of instruction in Lahainaluna Seminary and on the changes in the curriculum of study which such a change from the Hawaiian would be likely to necessitate.

"It has been apparent to me for some months, that the time had arrived when this change should be made. The greatest objection to it is now in some degree obviated; that it would prevent the mass of the more capable Hawaiian youth from availing themselves of the means of Higher education, which they have hitherto received at Lahainaluna in their own language. The multiplication of English schools for natives has now made it possible for perhaps a majority of Hawaiian lads to acquire such an elementary knowledge of English as would enable them to pursue many elementary studies in that language with profit, and in so doing to qualify themselves for higher studies.

"It seems to be now the fact, that the majority of those Hawaiian parents who are disposed to incur expense for their higher education of their sons, will do so only in schools where they will be likely to acquire a good practical knowledge of English. It has hence resulted, that of late years, our fourth class has num-
79 bered, on entering, from 12 to 15, whereas they used to be 30 or 40. At the same time the scholars already pursuing the

course have for three years past, shown an unusual degree of persistence in remaining, so that our numbers in attendance have not fallen off in the same proportion, we still having 50, in place of 80 a few years ago.

"I have felt a reluctance to propose this change of language, fearing a necessity to omit in consequence, the long-established and highly valued course of instruction, given in this Seminary in certain studies of an abstract nature, which it would only be possible to impart to Hawaiians in their own tongue. These are such as Moral Philosophy, Political Economy, Evidences of Christianity, and other subjects which have held a leading place in our curriculum, and which require a considerable portion of the time of one teacher. Some instruction in a part of these subjects might possibly be provided for without an increase of the corps of instructors but a part of them would probably have to be omitted, on account of the increased labor devolving on the white teachers, in consequence of teaching so many branches in a language strange to their pupils.

"Could the services of an exceptionally able Hawaiian teacher, such as Rev. M. Kuaea, be secured, some of these subjects might profitably be consigned to his instruction, although no Hawaiian possesses the requisite range of thought and reading to give any considerable ability on such topics.

"As to the most of the other studies pursued, I am convinced that they can be taught with success in English to scholars who on entering are already prepared by two or three years of good study of English. This is especially true of all Mathematics in our course, from written arithmetic up to surveying and navigation, in all which the constant repetition of terms and forms of expression immensely facilitates the work.

80 "The same is true in *Geography,* if books like Cornell's or Mitchell's series are used, where most of the work is in questions of topography, involving the same element of *repetition of forms.*

"*Natural Philosophy* and *Astronomy,* relating wholly to material and concrete objects, can be taught in English, involving, however, much more than Mathematics.

"*History,* which occupies a prominent place with us, might be taught by the use of a well-known & excellent Child's History. The *Hawn. Constitution,* being printed in both languages, would be readily taught.

"Physiology and other branches of Natural Science can be taught by the use of Hooker's Child's Book of Nature which is written in simple language.

"It would seem necessary, for the efficient prosecution of some of these studies, that *one* of the teachers should possess a tolerable acquaintance with Hawaiian, in order to explain the sense of terms employed. One teacher, if a man of ability, might find ample success, although ignorant of Hawaiian.

"The labor of instruction will be so largely augmented by the use of a foreign tongue, that it would seem necessary, without adding a third white teacher, to abridge materially the present curriculum.

But this abridgment need not, in that case, I think, go so far as to radically change the constituted character of the school, as one for Higher Education. It is also to be borne in mind that for those successfully graduating at Lahainaluna, Oahu College will afford the opportunity of further progress, for which they will then be qua*o*ified by their attainments in English.

"Very respectfully yours,

(Signed) "S. E. BISHOP."

Letter of S. E. Bishop referred to in minutes of the Board of Education, January 3, 1877. (Plaintiffs' Ex. 13.)

81 The proposed change was adopted by the board of education upon motion of E. O. Hall, a member of the board who was fiscal agent of the A. B. C. F. M. (Minutes Board of Education, March 27, 1877. Plaintiffs' Ex. 13.) It went into effect July 1, 1877. Dr. Bishop resigned and H. R. Hitchcock was appointed in his place. This marks a complete severance of the relations between Lahainaluna and the Hawaiian mission of its successor the Hawaiian Evangelical Association. From this date there is no evidence that those representing the mission in Hawaii ever nominated or were consulted in respect to the personnel of the teachers and the principals from that date to the present have been neither ministers nor missionaries.

Mr. Bishop became assistant in the North Pacific Missionary Institute which was reorganized the same year under the auspices of the American Board and the Hawaiian Evangelical Association as a training school for Hawaiian pastors and missionaries. (Reports President Board of Education 1880, p. 26; 1882, p. 37; 1894, p. 86, Plaintiffs' Ex. 13.)

The following extracts give the curriculum at Lahainaluna since 1877:

"The Board have also, in response to the popular demand, reorganized the National Seminary so as to make the English language the chief medium of instruction. The curriculum of study now embraces, besides the elementary branches, Algebra, Geometry, Trigonometry, Mensuration and Surveying, Science of Common Things, Bookkeeping, General History, Natural Philosophy and Physiology; all of which are taught in the English language. A few of the studies embracing subjects of Moral Science, History and Political Economy have been taught during the past year in Hawaiian; but these are hereafter to be omitted or taught only in the medium of English. The course also embraces original English Compositions and Orations, and Lectures on the Science and Practice of School teaching.

82 "The Nation looks to Lahainaluna as the nursery from which it is to be supplied with teachers, not only for its Common Schools, but also for its Select and English Schools."

Report President Board of Education 1878, p. 8.

"The course of study occupies four years, and is arranged with a view to give the pupils a good knowledge of English. It embraces

instruction in all the Higher Mathematics, in subjects of Natural and Moral Science, History and Political Economy, and also instruction in the principles and practice of teaching."

Report President Board of Education 1880, p. 17.

"The prescribed course of studies and instruction is arranged for four years. The first year, it comprises a thorough review of the branches usually taught in Grammar Schools. During the remaining years, the course is more extended, including Higher Mathematics, subjects of Natural and Moral Science, History and Political Economy. Instruction in Music forms a part of the regular exercises of the school. The several classes also have exercises in English Composition and Declamation."

Report President Board of Education 1882, p. 20.

"The Seminary is a part of the public school system in which instruction is provided in branches of study more advanced than those pursued at the other select schools. The regular course of instruction continues for four years; but pupils may be advanced according to their scholarship when they enter, so as to complete it in a shorter time. Besides a review of the usual common school branches the course of study embraces Algebra, Geometry, Trigonometry, Surveying, Bookkeeping, History, Natural Philosophy, Moral Science, Political Economy, and Physiology, English Composition, Music, Military Drill, and instruction in the theory and practice of School Teaching. Annual written examinations constitute a very important feature of the Seminary. The promotion of pupils from class to class is based on the results of these examinations."

83 Report President Board of Education 1884, p. 21.

"Course of Study.

"There are five classes in the school, representing five years' work, and the following is the course of study pursued:

"E Class—Reading, from 'Hawaii's Young People;' Drawing and Natural Science, Observation Work; Geography, Frye's advanced; Literature, De Garmo's Tales of Troy; Arithmetic, to percentage, Atwood; Agricultural Work.

"D Class—Literature, Cook's Ulysses; History, Andrew's Ten Boys; Physiology, Blaisdell's How to keep Well; Arithmetic, completed, Atwood; Drawing and Music; Printing.

"C Class—Literature, Black Beauty; History, connected stories from general history; Physics, Shaw's Physics by Experiment; Algebra, to unknown quantities, Wentworth; Drawing and Music; Carpentry and Wood Turning.

"B Class—Literature, Evangeline; History, American, Barnes'; Grammar; Geometry; through circles; Drawing and Music; Carpentry and Wood Turning.

"A Class—Literature; History, Hawaiian; Composition; Geometry, complete plane; Drawing and Music; Carpentry and Blacksmithing."

Report Superintendent of Public Instruction 1900, p. 88.

"Course of Study.

"E Class—Reading from 'Hawaii's Young People,' Baldwin's 'Fifty Famous Stories;' Great Americans for Little Americans; Reproduction of Stories; Letter Writing; Drill in Capitalization, Punctuation, Paragraphing, Phonics, etc. Memory Selections; Prince's Arithmetic No. IV completed; Geography; Current Events; Physiology, the Human Body and Its Health, by Smith; Music; Mechanical Drawing.

"D Class—Cooke's Stories of Ulysses; Blaisdell's Stories from English History; Mother Tongue, Book I; Current Events; Letter Writing; Short Poems Memorized; Arithmetic, Prince's Book V completed; Frye's Geography; Smith's Physiology; Music; Me-
84 chanical Drawing.

"C Class—Eggleston's First American History; Mother Tongue No. I, reviewed and No. II begun; Dole's Young Citizen; Current Events; Letter Writing; Arithmetic, Prince's Book VI, completed; Algebra begun; Agriculture, 'Agriculture for Beginners,' by Burkett, Stevens and Hill; Frye's Geography; Bookkeeping and Drawing.

"B Class—Eggleston's Advanced American History; Guerber's 'Roman History' (given orally, for oral and written reproduction); Current Events; Mother Tongue, No. II; Synopsis of Hawaiian Government; Letter Writing; Poems memorized; Arithmetic, Prince's Book VII completed; Algebra; Frye's Geography; Bookkeeping; Agriculture; 'Agriculture for Beginners,' by Burkett, Stevens and Hill.

"A Class—Alexander's Hawaiian History; National Stories; as Jewish Heroes, Cyrus the Great, Pericles, Alexander the Great, Julius Caesar, Charlemagne, Nelson, Napoleon, etc., given for oral and written production; supplementary reading; Current Events; Letter Writing; Memory Selections; Arithmetic, Prince's Book VIII completed; Wentworth's 'First Steps in Algebra,' reviewed; Geometry, Wentworth's First Book; Frye's Geography completed; Bookkeeping; Agriculture. In addition to the text books frequent reference is made to the publications of the Department of Agriculture."

Report Superintendent of Public Instruction 1906, p. 16.

Under the decision of the United States Supreme Court we are to construe the condition of transfer in the light of the circumstances which preceded it and the immediate and long continued practice under it. Confining ourselves for the present to the condition respecting religious instruction reading, "It shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of
which will be found in the confession of faith herewith en-
85 closed," the following possible constructions of the language may be considered:

(1) That the condition is purely negative in character and does not require the teaching of any religious doctrine. This construction is precluded by the decision of the United States Supreme Court.

(2) That the contents of the confession of faith should be taught as a formal doctrine or creed. There is no evidence that the parties ever acted upon this interpretation. No evidence has been presented that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. Dr. Bishop, who was in the school from 1865 until 1877, testified that he had never seen it. (Transcript p. 13.) In fact there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

(3) That religion should be taught and that as taught it should not be contrary to the doctrines mentioned. Thus construed it is obvious that it allows considerable latitude in the amount of religious instruction. If it means that theology shall form part of the curriculum of the school the condition was broken as early as 1877 and any action thereon is long since barred by the statute of limitations applicable to claims against the government. R. L. Sec. 2004. *Hartman* v. *United States*, 35 Ct. Cl. 106. If, however, the acts and statements of the parties in 1865 are to be relied upon as contemporaneous construction the same must be true of the acts of the parties in 1877 and *form* thence to the present day. The fact that the change from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious. The fact that this change was made upon the recommendation of Dr. Bishop and with the full acquiescence of all concerned from 1877 until 1903 is surely as potent as the actions of the parties during the preceding years. To the present day there has been no protest from the
86 American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board, the terms of which will be more fully considered later.

Unless the condition prescribes the amount and extent of religious instruction it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same. This, as testified to by the graduates and by the present principal, C. A. MacDonald, comprises morning and evening prayer including occasional discussions of passages of the scripture, compulsory attendance at Sunday school with preparation of the International Sunday school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which the pupils are required to discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. In point of time occupied it compares favorably with that prescribed by the "Laws of the High School" of 1835 as attached to the declaration and quoted in 206 U. S. 207. We regard this as a substantial compliance with the condition of transfer.

The question as to whether this constitutes Lahainaluna a sectarian institution within the prohibition of that portion of Sec. 55 of the

Organic Act reading, "Nor shall any public money be appropriated for the support or benefit of any sectarian, denominational or private school or any school not under the exclusive control of the government" is largely a question of the definition of the word "sectarian." This is defined by the Century dictionary as "Of or pertaining to a sect or sects," and the question in this case would depend
87 upon whether the singular or plural were chosen. The religious teaching at Lahainaluna is not that of any particular sect but would apparently be acceptable to all of the denominations usually known as orthodox or evangelical Christian denominations. Whether this is sectarian would depend substantially as to whether the Young Men's Christian Association, Christian Endeavor and the International Sunday school lessons are sectarian or nonsectarian. We believe a majority of persons belonging to any one of the denominations referred to would regard these as nonsectarian, while from the standpoint of a Roman Catholic or even an Episcopalian they would be regarded as sectarian because including a group of sects. As a matter of practical interpretation it may be noted that when the provision in question was under discussion for adoption as Article 97 of the constitution of 1894, a discussion participated in by W. O. Smith, one of the present plaintiffs, who opposed the article, there was no suggestion made that the contemplated provision would affect Lahainaluna.

"Delegate Carter said he had been at some pains to find out what schools would be affected by this article, and found that there were five. The first was Kawaiahao Seminary. Even if this was closed up, the work would be taken up by the Kamehameha Girls School. The second was the Makawao Seminary. This was one of the best and has done splendid work, and he would be glad to see it under the control of the Board of Education. The third was at Kohala, and could be greatly improved and enlarged if taken in hand by the board. There is no girls' school on Kauai. The Hilo Boarding School for Boys is another that will be affected, as it would lose about $400, but that is an insignificant amount compared with its expense. The Kauai Industrial School is the last one. It will be much better to take Government assistance away from these schools,
88 and he trusted that the report would receive the warm support of the Convention." Convention Proceedings 1894, June 19, Afternoon Session, p. 76.

In any event the question does not appear to be material to the present case, as it can make no difference to the plaintiffs whether the appropriations for the school from time to time were legal or not, while if the adoption of the Constitution of 1894 be regarded in any way as conclusive against the right of the Government to fulfil the conditions of transfer, the claim would be barred by the statute of limitations.

So far as the condition respecting the cultivation of sound literature and solid science is concerned a glance at the curriculum for 1900 and 1906 will show that there is no room for the contention that this condition has been broken. More literature has been taught in recent years than ever before and while the course in

mathematics is not quite so extensive as formerly a course which comprises arithmetic, bookkeeping, algebra and geometry cannot be said to fail in instruction in solid science.

Some stress has been laid upon the technical and agricultural instruction now given at Lahainaluna, but technical and agricultural training have been prominent features of the school for over half a century. A few extracts from the reports will illustrate this:

"In the high schools at Lahainaluna, Hilo and Waioli, Kauai, and Kohala, Hawaii, a portion of each day is devoted to labor, and with the most beneficial results. The scholars derive a large portion of their support from their own industry."

Report Minister of Public Instruction 1850, pp. 24, 25.

"One great cause of the firm health of these native youth is their occupation, for at least three hours each day, in the cultivation of the soil, for their own advantage. The institution owns a fine tract of kalo land near by, and from this the pupils derive their food and a large part of their living, by the labor of their own hands."

89 Report President Board of Education 1858, p. 12.

"A very important part of the system of education adopted at the Seminary is that of manual labor; important, as it furnishes the means of living to the students, most of whom are poor. At the same time it gives that health and vigor to their physical constitutions so necessary to the student; cultivates habits of industry and economy, and affords some knowledge of the principles and methods of agriculture.

"In this connexion, I am happy to approve very heartily of the suggestion contained in the report of the Principal; in regard to the planting of sugar cane on the lands of the Seminary, and hope the means for carrying out the project will be furnished. Should this be done, the students will be greatly benefited by the addition to their means of support, while the institution will share in some degree in the improvement."

Report President Board of Education 1862, p. 9.

"Whenever the locality and opportunities were favorable, a system of labor among the scholars has been promoted, as contributing not only to physical health, but also to the procuring of school books, slates, etc., for the scholars, and making them interested in the cultivation and adornment of their own schools and school land."

Report President Board of Education 1866, p. 3.

"More attention has been paid to the acquisition of the English language, and to industrial and agricultural pursuits, and a marked improvement both in the scholars and in the lands of the Seminary has been the consequence."

Report President Board of Education 1868, p. 3.

"Manual labor is also an important part of the system of education at the Seminary. It furnishes the pupils the means of living; gives health and vigor, and habits of industry and economy."

Report President Board of Education 1882, p. 20.

90 "Agricultural labor is also an essential feature of the school. By it the pupils furnish all their table supplies. During the past year a carpenter's shop has been built and fully

equipped with benches and tools for the use of pupils. The operations of the shop have been already noticed in this report."

Report President Board of Education 1884, p. 21.

"At Lahainaluna industrial training is given in agriculture, carpentry, mechanical drawing, printing, etc., and the students raise most of their own food. It is proposed that still more prominence shall be given to agricultural training in that school. For the materials and tools required in these lines of industrial labor a small appropriation will be asked for."

Report President Board of Education 1896, p. 7.

The emphasis laid on agricultural work in the past few years does not amount to a change in kind but one in degree, apparently prompted by a desire to obtain the federal aid available for agricultural colleges (Report Superintendent Public Instruction 1904 p. 7) an expectation not realized. There has been no change in the official designation of the school. The allegation concerning the name in the declaration appears to have been based upon one reference in the governor's report to the Lahainaluna agricultural school (uncapitalized) apparently overlooking numerous instances in the same and other reports in which the school is referred to under its official title.

While we base our decision upon the consideration of the substantial rights involved, we are also of the opinion that the present plaintiffs are not entitled to maintain this action. They claim as trustees under an indenture dated July 25, 1903, between the American Board of Commissioners for Foreign Missions and F. J. Lowrey, Henry Waterhouse and William O. Smith, trustees, George P. Castle having afterwards been substituted in place of Henry Water-
91 house. The indenture in question recites that the "grantor is the owner of certain lands, tenements, hereditaments and the appurtenances thereto belonging, situate in the Hawaiian Islands hereinafter described and referred to, and is desirous of contributing to the support and maintenance of the Board of the Hawaiian Evangelical Association, an Hawaiian eleemosynary corporation organized and established for the corporate purpose of mutual counsel and assistance in the great work of propagating Protestant Christianity, and to enter into common measures for promoting knowledge and religion, and for preventing infidelity, error and immorality; and said grantor proposes now to convey the said lands and property, hereinafter particularly described and referred to, in trust for the use, benefit and behoof of the said Board of the Hawaiian Evangelical Association, to the extent and in the manner hereinafter set forth, in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands, and to that end it has been agreed between the parties hereto and said intended beneficiary that these presents shall be executed."

The property conveyed by the instrument is described as "all and singular the lands and real estate situate in said Territory of Hawaii belonging to said grantor, described and particularly referred to in the schedule hereunto annexed, marked 'Schedule A,' reference to which is hereby made and the same made a part hereof, together

with all other lands in the possession of or belonging to said grantor or in or to which said grantor has any right, title interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intents and purposes as though a particular description thereof were herein incorporated and included in said Schedule."

The schedule makes no mention of Lahainaluna, and the
92 only contention which would support the claim of the plaintiffs is that a claim to a sum of money which the defendant has the option of paying as an alternative to the conveyance of certain property upon breach of condition is covered by the language quoted. We do not so construe the language. The claim of the plaintiffs in this respect would be stronger if they were claiming a reconveyance of the land as an alternative, but their declaration takes the position that the option has been exercised by the actions of the government in the matter and that the money is absolutely due. The conveyance in question does not appear to assign any money claims or demands, whether accruing before or after the conveyance, but only lands in or to which the grantor has any right, title, interest, claim or demand. Still less can it be held to cover a claim not existing at the date of the conveyance, but which according to the allegations of the declaration, accrued thereafter. The general tenor of the declaration of trust supports the conclusion that only real estate was in the contemplation of the parties.

Judgment for the defendant.

D. L. Withington, W. R. Castle and C. H. Olson (Smith & Lewis with them on briefs) for plaintiffs.

M. F. Prosser and C. R. Hemenway, Attorney General, for defendant.

(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.
(Signed) SIDNEY BALLOU.

Indorsement: No. 5. Supreme Court Territory of Hawaii. October Term, 1907. Frederick J. Lowrey, et al. v. Territory of Hawaii. Opinion. Filed July 1, 1908, at 10 o'clock A. M. J. A. Thompson, Clerk.

93 In the Supreme Court of the Territory of Hawaii, October, 1907, Term.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Plaintiffs,

vs.

THE TERRITORY OF HAWAII, Defendant

Judgment.

This cause having come on regularly to be heard, plaintiffs being represented by Messrs. Castle & Withington, and C. H. Olson, and defendant by Messrs. C. R. Hemenway, Attorney General, and M. F.

Prosser, and evidence, both written and verbal, having been submitted before the Court, and the Court having considered the same, and having heretofore and on the 1st day of July, 1908, rendered its decision, in writing, finding in favor of the defendant, therefore,

It is ordered and adjudged by the Court that plaintiffs have and take nothing from defendant, and that defendant recover of plaintiffs its costs and disbursements incurred herein, amounting to the sum of Fifty-five and 00/100 ($55.00/100) Dollars, and that it have execution therefor.

By the Court,

[SEAL.] (Signed) J. A. THOMPSON, *Clerk.*

Dated at Honolulu September 8, 1908.

O. K. as to form.
(Sig.) C. H. OLSON,
Att'y for Plaintiffs.

94 Endorsement: Supreme Court Territory of Hawaii. October Term, 1907. Session 190–. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Plaintiffs, vs. The Territory of Hawaii, Defendant. Judgment. Filed September 8, 1908, at 11.40 o'clock A. M. J. A. Thompson, Clerk. C. R. Hemenway, Atty. Genl., For Defendant.

95 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees,
vs.
THE TERRITORY OF HAWAII.

Original Appeal.

Appeal.

The above named Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, conceiving themselves aggrieved by the decision made and entered on the 8th day of September, 1908, in the above entitled proceeding, do hereby appeal from said decision; and pray that their appeal may be allowed for the reasons specified in the assignment of errors, and that a transcript of the record and proceedings, and papers upon which said decision was made, duly authenticated, excepting that, instead of the evidence at large, a statement of the facts of the case shall be certified by this court, may be sent to the Supreme Court of the United States.

Dated, Honolulu, Territory of Hawaii, March 31st, A. D. 1909.

CASTLE & WITHINGTON,
CLARENCE H. OLSON,
Attorneys for Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees.

And now, to wit, on this 31st day of March, A. D. 1909, it is ordered that the appeal be allowed as prayed for.

[Seal Supreme Court, Territory Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

96 Service of the within and foregoing appeal and citation, and the receipt of a copy thereof, admitted this 31st day of March, A. D. 1909.

C. R. HEMENWAY,
Attorney General and Attorney for the Territory of Hawaii.

97 [Endorsed:] Original. — No. —. Supreme Court, Territory of Hawaii. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Appellants, vs. The Territory of Hawaii, Appellee. Appeal. Filed and issued for service March 31, 1909 at 3:10 o'clock P. M. J. A. Thompson, Clerk. Returned at 3:40 o'clock P. M., March 31, 1909. J. A. Thompson, Clerk. Castle & Withington, Clarence H. Olson, Attorneys for Appellants.

98 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

Bond on Appeal.

Know all men by these presents: That Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, as Principals, and C. H. Cooke and W. A. Bowen as Sureties, all of Honolulu, in the Island of Oahu, Territory of Hawaii, are held and firmly bound unto the Territory of Hawaii in the full and just sum of One Thousand Dollars, to be paid to the said Territory of Hawaii, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of March, 1909.

Whereas, the above named Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, have prosecuted an appeal to the Supreme Court of the United States, to reverse the decision rendered in the above entitled proceeding by the Supreme Court of the Territory of Hawaii;

Now, therefore, the condition of this obligation is such that if the above named Frederick J. Lowrey, George P. Castle and William

O. Smith, shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in
99 full force and effect.

(Sg.) FREDERICK J. LOWREY, *Trustee.*
(") W. O. SMITH, *Trustee.*
(") GEORGE P. CASTLE, *Trustee.*
(") C. H. COOKE.
("). W. A. BOWEN.

Approved by:

(Sg.) ALFRED S. HARTWELL,
Chief Justice of the Supreme Court, Territory of Hawaii.

Indorsement: Original. 108. — No. —. Supreme Court of the United States. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Appellants, vs. The Territory of Hawaii, Appellee. Bond on Appeal. Filed March 31, 1909, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, Clarence H. Olson, Attorneys for Appellants.

100 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, appellants in the above entitled action, and say that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That said Supreme Court of the Territory of Hawaii erred in allowing the appellee to answer, and particularly in allowing the appellee to set up the Statute of Limitations in said answer, without leave of the Supreme Court of the United States.

2. That there is error in denying the appellants' motion for judgment, on the ground that the decision of the Supreme Court of the United States disposed of the whole case and that, if any further or additional answer is to be made, application should have been made to that court.

3. That there is error in holding that morning and evening prayer, including occasional discussions of passages of the Scripture, compulsory attendance at Sunday-school on the part of the boarding pupils, with preparation of the International Sunday-school Lessons

furnished by the Hawaiian Board, and compulsory attend-
101 ance at Christian Endeavor exercises Sunday evenings, at which pupils are required to discuss Biblical subjects based on the Christian Endeavor topics as given in the Christian Endeavor World, are a substantial compliance with the condition of transfer of the property in suit.

4. That there is error in holding that there is no evidence that the parties ever acted upon the interpretation that the contents of the Confession of Faith should be taught as a formal doctrine or creed, and that no evidence is presented that the substituted Confession of Faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period, and that there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere; on the ground that the uncontradicted evidence shows that during Dr. Bishop's incumbency from 1865 to 1877, and at all times prior thereto, the teaching was of the system of doctrine represented in that Confession of Faith, and that while no formal or written standard was used, the doctrines taught by the American Mission were well-known and understood, accepted as authoritative and taught, and the system of doctrine followed was substantially the old orthodox Congregational or Presbyterian doctrine, and that the Confession of Faith very well represents the form of doctrine which was taught.

5. That there is error in holding that the change of instruction from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of studies of a theological nature.

6. That there is error in holding that there is full acquiescence, or any acquiescence, shown by the appellants or the American Board to any change in the religious instruction given in the institution.

102 7. That there is error in holding that the change from Hawaiian to English in 1877 was made with the full acquiescence of all concerned from 1877 until 1903, in that the evidence shows that the American Board of Commissioners for Foreign Missions withdrew active work in the Hawaiian Islands in 1863, only maintaining a fiscal agent, whose chief duty in later years was the payment of salaries to the original missionaries still living, and that no evidence of any acquiescence is shown, excepting that the change of teaching from Hawaiian to English was made at a meeting March 27, 1877, of the Board of Education on Motion of the fiscal agent.

8. That there is error in holding that from 1877 until the present date the course of religious instruction has been substantially the same, in that the uncontradicted evidence shows that at least until 1882 the same instruction in religion and theology continued as under Dr. Bishop.

9. That there is error in holding that from 1877 to the present date the course of religious instruction has been substantially the same, comprises morning and evening prayer including occasional discussions of passages of the Scripture, compulsory attendance at Sunday-school with preparation of the International Sunday-school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which

the pupils are required to discuss Biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World; in that there was no compulsory attendance at Sunday-school on Sunday mornings and under the present Principal no compulsory preparation of the lesson, no morning and evening prayer other than, in the morning, a reading of the Bible, a repeating of the Lord's Prayer and the singing of a hymn, with the occasional discussion of passages of the Bible read, in the nature of inci-
103 dental remarks, avoiding any controversal point or sectarian instruction, and that the required attendance on Sunday at the Christian Endeavor meetings did not apply to the day pupils and at such meetings children were not required to discuss Biblical matters, and that there is no evening prayer whatever.

10. That there is error in holding that if the condition means that theology shall form part of the curriculum of the school, the condition was broken as early as 1877 and any action thereon long since barred by the Statute of Limitations applicable to claims against the Government. (Revised Laws, Sec. 2004.)

11. That there is error in holding that the Statute of Limitations as to claims against the Government is applicable to this case, since the uncontradicted evidence is that no moneyed claim against the Territory arose until March, 1904—less than two years before the filing of the petition.

12. That there is error in holding that if the adoption of the Constitution of Hawaii of 1894 be regarded in any way as conclusive against the claim of the Government to fulfill the conditions of transfer, the claim would be barred by the Statute of Limitations.

13. That there is error in holding that the condition attached to the transfer in regard to continuing the existing seminary and providing that the grantee shall not teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated is to be construed to be an agreement only that religion should be taught, and that, as taught, it should not be contrary to the doctrines maintained.

14. That there is error in holding that there is any religious instruction such as is contemplated by the agreement given at the present date as a part of the curriculum at Lahainaluna, or
104 that any of the religious tenets or doctrines contemplated by the agreement are taught or allowed to be taught in Lahainaluna, or were taught or allowed to be taught at the time of the demand by the appellants in this action upon the Territory.

15. That there is error in holding that the appellants are not entitled to maintain this action, and that the conveyance from the American Board of Commissioners for the Foreign Missions did not convey all the rights of said Board to the land in question and to the payment provided for breach of the conditions in the transfer.

16. That there is error in rendering judgment for the respondent against the appellants, the facts showing that the appellants were entitled to judgment as prayed for.

Dated, Honolulu, March 31, A. D. 1909.

Respectfully submitted,

(Sg.) CASTLE & WITHINGTON.
(") CLARENCE H. OLSON.

Indorsement: Original — No. — Supreme Court United States. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Appellants, vs. The Territory of Hawaii, Appellee. Assignment of Errors. Filed March 31, 1909, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, C. H. Olson, Attorneys for Appellants.

105 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, in a cause wherein Frederick J. Lowrey, George P. Castle and William O. Smith are appellants, and you, Territory of Hawaii, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii, this 31st day of March, in the year of our Lord one thousand nine hundred nine.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

106 [Endorsed:] Original. — No. — Supreme Court of the United States. Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, Appellants, vs. The Territory of Hawaii, Appellee. Citation on Appeal. Filed March 31, 1909, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, Clarence H. Olson, Attorneys for Appellants.

107 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees,
v.
THE TERRITORY OF HAWAII.

Findings of Fact.

I.

Circumstances prior to transfer of 1849.

(1) The institution at Lahainaluna, originally called the High School and afterwards the Missionary Seminary, was founded by the missionaries of the American Board in 1831. From that date until 1849 it was the most notable of the educational institutions founded by the missionaries who, with all their intense theological convictions, still devoted the greater part of their lives to the secular education of an entire nation. The early years of the school were, however, marked with many vicissitudes. The accounts of the seminary from missionary sources are usually laudatory while those of independent observers are far less flattering. Commodore Wilkes, who visited the seminary in 1841, reports:

"In all the departments of this establishment I saw nothing but ill directed means and a waste of funds that might have been avoided by proper forecast, and a full examination of the subject by practical men. The school has passed its meridian and is now fast going to decay, a fact which must strike every one on a casual visit." 4 Wilkes, United States Exploring Expedition, 247.

(2) "In 1848 the principal's report personifies the seminary as follows: Though she tries to keep up an appearance of her
108 former greatness and seems sensible of the fact that she is less admired than formerly yet she stands at her post and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her. Report for two years ending May, 1848, Plaintiffs' Ex. 25.

"During the next winter studies at the institution were practically broken up by sickness in the principal's family followed by successive epidemics of measles, influenza and whooping cough. School operations were suspended in February and no new class entered pending action of the general meeting of the mission. The report for that year says:

"A new class, according to custom, should be entered this year. It has not been called for yet by us because we thought it best first to hear what changes will actually be decided on by the mission at this meeting. The late unparalleled diminution of population may have also some effect in modifying the views of the mission in regard to this school and render it expedient in their minds to alter its operations or the number of its scholars, these with other reasons

induced the teachers to defer the calling of another class until after this meeting of the mission.

"If it is decided by the mission to call a new class we wish to present a few considerations to the brethren to guide them in their selections. Many thousand dollars of money have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class when they felt there were enough in the nation that would do honor to their training at the seminary. Report, June, 1848, to April, 1849, Plaintiffs' Ex. 26.

"Besides these conditions and the emigration to the gold fields of California, also referred to in the report, the general meeting
109 had to face an embarrassed condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From report of committee, April 25, 1849, Plaintiffs' Ex. J.) It was under these circumstances that the offer of transfer to the Hawaiian government was made."

II.

Transfer to Hawaiian government.

Following the general meeting of the mission in April, 1849, in pursuance of a vote of the Mission "to make over this seminary to the Government, it being understood that it is to be conducted on the same principles as heretofore," the following correspondence took place between a committee of the meeting and the minister of public instruction:

HONOLULU, *April* 25, 1849.

"To his Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

SIR: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of his government that in the year 1831 the mission commenced the establishment of the institution now known as the Mission Seminary at Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the islands.

From that period to the present time this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its ap-
110 propriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the islands, filling various posts of honor, responsibility and usefulness, both in and out of the government. They are well known to His Majesty, and the officers of his government, and to none better than yourself.

The institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00, incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the missions under its care, and this Mission, in common with others, has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the vigor to be desired in all of its departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests
111 of the Hawaiian people, we beg leave through your Excellency to submit to His Majesty's government for its consideration the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the seminary buildings located at Lahainaluna on the island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the mission as a printing office and bindery; also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby trans-

ferred hereinbefore specified, together with any additions or
112 improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government by the said Island Mission shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions.

These proposals, if accepted by the Hawaiian Government, shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board — Commissioners of Foreign Missions in Boston, and further, should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the conditions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission, on its part, pledges itself to refund to the said Government any necessary expenses it may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators, one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's Government, and I feel greatly obliged by an early answer.

We have the honor to be

Very respectfully, your ex. friends and most obedient servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,
By S. N. CASTLE,
Com."

113 (4) Enclosed with the above letter was a printed profession of faith reading as follows:

"The Lord Jehovah our Creator has given to the world a law which is holy just and good, that we should love him with the whole heart, and glorify him in all that we do.

"This law I have often broken, and have made myself exceeding sinful in his sight. Now I hate my sins, I repent of them, and renounce them. God so loved the world that he gave his son that whosoever believeth in him should not perish but have everlasting life. He has invited me to come to him. This I have resolved to do, and to devote myself to his service. I adore his rich grace in calling me to the feast of the gospel. I do now hope for a part in the blessings of his wonderful redemption. I desire to do what I can to promote his glory and the salvation of my fellow men, and I feel

it to be a duty and a privilege to take on me the vows of his everlasting covenant.

"I do therefore in the presence of God and before the world, make a solemn declaration of my faith.

"1. I believe in Jehovah;—that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is every where present and sees all things; that in power and wisdom, and goodness, in all perfections and excellences he is infinite; that he made the earth and the heavens, men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure; that he alone is God and that all beside him that are called gods are vanity and the work of errors.

"2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

114 "3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that consequently all mankind of every generation are naturally in a state of corruption, guilt and death.

"4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his Son into the world, made of a woman and in the likeness of man.

"5. I believe in the Lord Jesus Christ: that he is the Son of God; that he died upon the cross as a propitiation for our sins, and for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justification unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the king of Zion, has all power in heaven and earth, and will judge the quick and the dead.

"6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

"7. I believe that in all ages, Jehovah has had a church in the world, in which he has graciously dwelt, and which he designs to establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

"8. I believe in the resurrection of the body; in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

"Dedication and covenant.

"And now in conformity with these sacred and momentous
115 truths, and in the presence of angels and men I make a solemn dedication of myself and of my all; avouching this day, the Lord Jehovah, Father, Son and Holy Ghost, to be my God, my Father, my Savior, my Sanctifier, and humbly giving up myself to him my chosen portion, to be his, and only his forever. I acknowledge my everlasting and indispensable obligation to glorify God in

all the duties of a holy life according to his word. Depending on his all sufficient grace I engage to walk as a christian in the faith and order of the gospel, conscientiously attending the worship of God, in secret, in family, and in public,—upon the sacraments of the New Testament, Baptism and the Lord's supper, and the discipline of his kingdom. I do solemnly covenant to walk with God's people, to watch over them, and submit to their Christian watch and care, to let my light shine before men, and to seek the glory of God in promoting their happiness and salvation.

"Having confessed my sins, before this church and made a public profession of my faith in Jesus Christ, and with their consent taken on me the vows of his everlasting covenant, and solemnly engaged to be the Lord's and to walk with his people as a Christian, and as a citizen of Zion, I desire moreover to unite fully with this particular church, and have my name enrolled with theirs, as one of their members to enjoy their privileges, and to engage with them in the service of God our Sovior.

"Honolulu, Sandwich Islands."

(5) The Privy Council thereupon, on April 26, 1849, took the following action, as appears from their records:

"A communication having been received from the Rev. W. P. Alexander, Rev. C. B. Andrews and S. N. Castle, as a committee of the American Mission of these Islands proposing to transfer the entire property of the Seminary at Lahainaluna, Island of Maui, to
116 the Government of the Hawaiian Islands, to be its property forever, on certain specified conditions, therefore,

Resolved, I. That the above proposals be accepted, subject to the ratification of the Legislature; provided, that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000 to said Mission, in behalf of the Mission Board of Boston

Resolved, II. That the sum of $3000 be appropriated from the Royal Treasury for the support of said Institutions for one year, commencing on the first day of June next.

Resolved, III. That the Minister of Public Instruction be instructed to secure the services of two competent teachers for said Seminary on such terms as to him may seem equitable and proper.

Resolved, IV. That the Institutions be committed to the Minister of Public Instruction, as in the case of the Royal School; and that it be his duty to make an annual report of the same to the Legislature.

117 Resolved, V. That all lands belonging to the Government in Kaanapali be appropriated to the use of the said Seminary at Lahainaluna, to be disposed of by the Minister of Public Instruction in consultation with the King's Cabinet with a view to providing as far as possible, an annual income for the support of the Seminary above named."

(6) The government replied under date of April 27, 1849, as follows:

OFFICE OF PUBLIC INSTRUCTION,
April 27th, 1849.

"To Rev. Wm. P. Alexander, Rev. C. B. Andrews, S. N. Castle.

GENTLEMEN: I have the honor to acknowledge the receipt of your letter of the 25th inst. proposing on certain conditions, to transfer the Seminary at Lahainaluna to the Government of these Islands; and to inform you that your generous proposal was this day submitted to His Majesty in Privy Council, and the resolutions enclosed were unanimously adopted with reference thereto.

You will please to inform me at your earliest convenience, whether the several conditions specified in these resolutions are acceded to by the Mission; and accept in the meantime the acknowledgements of His Majesty's Government for so valuable an offer.

I am gentlemen, with the highest esteem, your obedient humble servant,

(Sgd.) RICHARD ARMSTRONG,
Minister of Public Instruction."

(7) HONOLULU, *April 28th*, 1849.

"To Ex. R. Armstrong, Minister of Public Instruction of his Hawaiian Majesty.

SIR: Your letter of the 27th inst. with certain resolutions
118 of His Majesty's Privy Council accompanying, in answer to and based upon certain proposals, made by the undersigned as committee, on behalf of the American Mission, through your Excellency, to His Majesty's Government, respecting the Mission Seminary, on the 25th inst., came to hand last evening.

The said letter and resolutions have been laid before the general meeting of the Mission, for its action and we are directed to furnish your Excellency, for the use of his Majesty's government a copy of the preamble and resolutions adopted on the occasion, which we have the honor to transmit herewith.

We remain very truly,
Your most obedient servants,

(Sgd.) W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,
Committee.

(8) Thereupon at the general meeting of the Mission on April 28, 1849, the following resolutions were passed:

"Whereas, a letter has been received by this Mission through

Messrs. Alexander, Andrews and Castle, a committee appointed in reference to the Mission Seminary at Lahainaluna, from Mr. Armstrong, His Majesty's Minister of Public Instruction, accompanied by a copy of resolutions passed by His Majesty's privy council of the 27th of April last, accepting of certain conditional proposals in reference to the said seminary, made by said committee on behalf of the Mission on the 25th inst., and

Whereas, His Majesty's government has been pleased to add certain other proposals or conditions to those of said committee, made on behalf of the said Sandwich Islands Mission therefore,

Resolved 1st. That this Mission, assembled in general meeting, approve of and accept the said additional conditions proposed by His Majesty's government and that, if further testimonials
119 of conveyance than is found in the correspondence between the said committee and the said Hawaiian government be deemed necessary by the said government, the Minister of Public Instruction, or such other officer as shall be deemed proper by his Majesty's government, be requested to make or cause to be made out duplicate copies of the said instrument of conveyance, embracing all particulars, which shall be thought necessary, one of the said copies to be delivered to this Mission, to be deposited in its Archives.

Resolved 2nd. That the said committee be instructed to furnish the Mission of Public Instruction with a copy of this preamble and these resolutions for the use of His Majesty's government."

(9) "HONOLULU, *May* 8, 1849.

"To His Ex. R. Armstrong, Minister of Public Instruction of his Hawaiian Majesty.

SIR: Being instructed by the American Mission in their General Meeting lately adjourned, we would, as their Comtee. most respectfully present for your consideration the Confession of Faith within enclosed, as a substitute for the one given with the Articles of agreement, transferring the Mission Sem. at L-luna to the Hawaiian Government.

The reasons for requesting the substitution are, that the previously presented Confession—although according, in all its specified doctrines, with our belief, & with that also of the churches by whom that Institution has been founded & sustained—is yet not so distinctive as to present a barrier to the introduction there of other & deleterious doctrines not specified in sd. Confession. It will admit also of teaching in that Seminary, views entirely at variance with those of this Mission & of the churches sustaining it; such as we feel to be entirely subversive of Evangelical Christianity.
120 Not doubting but that these reasons will commend themselves to the members of His Majesty's Govt. we beg leave to express, in presenting them, the high consideration with which we remain.

Your Ex. most sincere Friends & obednt. Servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,
Comte."

"We Believe:

"1st. That there is one only living & true God, the creator, preserver & Governor of the Universe; a Being self-existent, independent, & immutable, infinite in power, wisdom, justice, goodness, mercy & truth.

"2d. That the Scriptures of the Old & New Testaments were given by inspiration of God; that they contain a complete & harmonious system of Divine truth, & are the only perfect rule of Christian faith & practice.

"3d. That God is revealed in the Scriptures as the Father, the Son & the Holy Ghost, & that these three are one, &, in all Divine attributes, equal.

"4th. That God made all things for himself; that he governs all things according to the counsel of his own will, & that the principles & administration of his government are holy, just & good.

"5th. That our first parents were originally holy; that they fell from that state by transgressing the command of God; & that, in consequence of their apostacy, all their descendants are without holiness, & alienated from God, until their hearts are renewed by Divine Grace.

"6th. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, & death, made an atonement for sin, on account of which pardon & salvation are offered to all who truly repent & believe in him; & that all who will, may come & take of the
121 water of life freely; but, that such is the aversion of man to these terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit.

"7th. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be holy & without blame before him in love; & that they should be saved, not by works of righteousness which they have done, but according to the distinguishing mercy of God, through sanctification of the spirit, & belief of the truth.

"8th. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto salvation.

"9th. That there will be a general resurrection both of the just & of the unjust; & a day of judgment, when all must give account to Christ of all the deeds done in the body; when the impenitent will go away into punishment, & the righteous into life, both of which will be without end.

"10th. That the Lord Jesus Christ has a visible church in this world; that the terms of membership are a credible profession of faith in Christ, & of that holiness which is wrought by the renewing grace of God: that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper & that only they & their households can be admitted to the ordinance of Baptism."

(10) "OFFICE OF PUBLIC INSTRUCTION, *May 24th*, 1849.

"To Rev. Wm. P. Alexander, Rev. C. B. Andrews, & S. N. Castle, Esq.

"GENTLEMEN: Your letter of May 8th, enclosing a confession of faith, which you request may be substituted for the one accompanying your letter of the 25th of April, has been received, & I
122 have only to state that the request is granted, & the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board, & the Legislature of the Islands.

Very respectfully, your humble servant,

R. ARMSTRONG,
Minr. of Pub. Instruction."

(11) "HONOLULU, *March*, 1850.

"D. SIR: On behalf of the committee acting for the Mission in the interim of Genl. Meeting I beg leave for the information of His Majesty's Government to communicate to you the following resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Missions on the 21st of August 1849, viz.:

"Resolved, That the agreement entered into by the Sandwich Islands Mission in April last transferring the Seminary at Lahainaluna in the Sandwich Islands to the Government of said Islands on conditions stated in a letter from the Mission to the Minister of Public Instruction dated Honolulu April 25, 1849, and in a letter from the Minister of Public Instruction dated April 27, 1849, be approved by the Prudential Committee & that the Secretary having charge of the foreign correspondence give immediate information of this fact to the Mission.

"Very respectfully, your friend & Servt.,

"SAML. N. CASTLE.

"To His Ex. R. Armstrong, Minister of Public Instruction of the Haw'n Govt."

123 (12) The Legislature of the Kingdom of Hawaii passed the Act of July 11, 1850 (F. C. 1850), Civil Code 1859, Sec. 738, ratifying the arrangement, and it was ratified by the American Board; but the correspondence before the prudential committee at the time of its ratification of the agreement did not include the letter from the committee to the minister of public instruction dated May 8, 1849, and the letter from the minister of public instruction to the committee dated May 24, 1849, relating to the substitution of the new confession of faith, and there is no evidence that this correspondence was ever before the prudential committee or acted upon by it.

(13) The transfer to the governmnt was upon the consideration of the withdrawal by the mission of a pending claim to an award by the Land Commission.

III.

Curriculum of Lahainaluna from 1835 to 1863.

(14) The following was the proposed curriculum shortly after the institution of the school:

First Year.

Arithmetic, geometry and trigonometry, sacred geography, Hawaiian grammar, languages for a select class.

Second Year.

Mathematics, embracing algebra, navigation and surveying, history, languages for a select class.

Third Year.

Mathematics continued, natural philosophy, moral philosophy languages for a select class.

Fourth Year.

Astronomy, chemistry, moral philosophy continued, languages for a select class.

The laws of the High School were read, amended and the different articles adopted as follows:

"Whereas in the good providences of God, the experiment of the High School established by the Mission in 1831, having proved successful, and having accomplished all that could reasonably have been expected, and the necessity of such an institution still continuing, the directors now lay before the Mission a more definite and enlarged plan of operations, such as they suppose from actual experiment to be practicable, and of the highest interests to the moral, social, literary and spiritual condition of this people.

124 Chapter 1.

Design of the school. The design of the High School is:

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Savior Jesus Christ, with all its accompanying blessings, civil, literary and religious.

2. As a means for accomplishing this great end it is the design of the High School to disseminate sound knowledge throughout the islands, embracing general literature and the sciences and whatever may tend to elevate the whole mass of the people, from their present ignorance and degradation, and cause them to become a thinking, enlightened and virtuous people.

3. A more definite object of the High School is to train up and qualify school teachers for their respective duties; to teach them theoretically and practically the best methods of communicating instruction to others; together with a knowledge of the arts, usages and habits of civilized life, with all their train of social blessings.

4. Another object still more definite and of equal or greater importance is to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

Chapter 2.

Of the Board of Directors.

1. The High School shall be under the superintendence of a committee of seven including the teachers, and chosen annually from the islands of Maui and Molokai, a majority of whom shall form a quorum for doing business, and whose duty it shall be to watch over the interests of the school, point out the course of instruction to be pursued, devise plans and measures for its increase and facilities for its operations, lay plans for buildings and devise means of erecting them, and attend to all unforeseen business necessary to the prosperity of the school.

2. It shall be their duty also to examine from time to time the plans of instruction pursued in the school, and shall have power to approve, alter or recommend others, as they may judge best adapted to promote the objects of the school.

3. It shall also be the duty of the committee, either in person or by the appointment of others, to attend to the public examination of the schools.

Chapter 3.

Of the Instructors.

1. The instruction of the school shall be conducted by a principal and one or more assistant instructors as the exigencies of the school shall require.

2. It shall be the duty of the principal to take charge of apparatus or all articles used as means of communicating instruction, take the general oversight of the institution, and with the approbation of the assistant instructors appoint studies not previously appointed, class the students, hear recitations in his department, deliver lectures, &c., and he may also be present at any recitation of the school.

3. He shall have power, with the advice of the assistant instructors, to appoint or employ native teachers or monitors of particular classes or divisions of classes as he may think necessary or conducive to the good of the school.

4. It shall be his duty to keep an account of the state of the school, progress of the scholars, and method of instruction, and report to the mission at each general meeting.

125 5. He shall also watch over the moral and spiritual interests of the scholars; he shall cause a portion of their weekly studies to be directed to the great truths of the Bible, that while they increase in science and literature they may have the means of that knowledge which makes wise unto salvation.

6. It shall be the duty of the assistant instructors to aid the principal in carrying the designs of the school into execution. For this purpose different branches of instruction shall be assigned to each, and they shall conduct the studies in their own department as they shall think best.

7. The principal, with the assistant instructors, shall constitute a faculty for the government of the school.

8. It shall be the duty of the instructors to meet regularly at stated times to consult upon the affairs of the school, general and particular, and discuss such topics as shall appear for the interest and welfare of the school, and keep an account of the matters discussed, with the decisions.

9. It shall be the duty of all the instructors to visit in rotation each of the houses of the scholars, at least once a week during term time, to encourage improvement in domestic habits and character, and promote the spiritual welfare of the scholars as occasion may offer.

10. If for sufficient reasons any scholars shall be regularly discharged, it shall be the duty of the principal to give a certificate of the same, which shall be signed by the other teachers.

11. The instructors shall have power to make and adopt such rules and by-laws for the internal regulation of the school as they shall think best, subject, however, to the review of the mission.

Chapter 6.

Of the Scholars.

1. Scholars may be admitted into the High School between the ages of 12 and 25 years.

2. Every scholar before he enters the school shall sustain an examination before the instructors in reading, writing, mental arithmetic and topographical geography.

3. The portion of scholars that may enter annually from each of the islands is as follows: Hawaii, 18; Maui, 14; Oahu, 10; Kauai, 8.

4. After having sustained an examination the candidate, on entering, shall read aloud in the presence of the school, the following declaration of obedience to the laws and regulations of the school, and shall register his name in a book kept for the purpose with the date of his entrance.

On account of my desire for knowledge and instruction and its benefits, therefore it is my wish to enter this school.

I declare it to be my intention to obey the laws of the school.

I will be diligent in my attention to all the instruction of the teachers.

I will attend regularly upon the duties of the school and give my mind to the things taught.

I will not forsake the school or go elsewhere until I shall first have obtained the consent of the teachers.

That it may be clear that this is my desire, I subscribe my name in the register book of the scholars of this High School.

5. It shall be the duty of the scholars to attend regularly and punctually to all the duties of the school on the week days and all the instructions of the Sabbath. For this purpose all the
126 scholars shall be required to live in the neighborhood of the school except with special permission granted by the instruct-

ors, which permission shall not extend without renewal beyond the time of a single term.

6. Every scholar shall be expected to procure and wear a uniform suit, of such quality and pattern as the teachers shall point out.

7. Every scholar shall be informed on entering the school that manual labor is a part of the duties of the school to which a portion of his time will be directed. Every scholar also on entering shall receive a printed copy of the laws of the school.

8. If it shall appear, after a few months' probation, that any scholar is deficient in abilities for receiving instruction he may be dismissed; the teacher candidly stating to him the reason.

9. If any scholar shall become indolent or inattentive to the duties of the school, or otherwise exerting an unfavorable influence, he shall be reproved, and other means used to reclaim him, and if persisted in shall be excluded. But if any scholar shall be guilty of adultery, drunkenness, gambling or theft he may, at the discretion of the faculty, be forthwith expelled.

10. Tuition shall be fixed at present at the rate of ten dollars per year, but may be paid in labor, for the use of the school.

11. When any scholar or class shall have staid at the school the full time proposed, and shall have made proper proficiency in the branches taught, he shall on leaving receive the following certificate signed by all the instructors.

HIGH SCHOOL. *Lahainaluna*, ——, 18—.

This letter certifies that —— —— has resided these four years past at the High School, has obeyed its laws, attended to all the branches taught, and is competent to instruct others. His moral character has not been impeached and he leaves with the respect of the teachers.

127 (15) So far as the proposed curriculum contemplated the preparation of graduates of the school for immediate service in the ministry it was never carried out, though frequently referred to by contemporaneous writers as the eventual design of the school. The main object of the school from 1835 to 1839 was the education of Hawaiian teachers for the common schools.

(16) The curriculum of the school in 1846 was as follows:

The branches taught in the school are Sacred Geography, Universal Geography, History, Sacred and Profane, Hawaiian Grammar, Algebra, Geometry, Trigonometry, Navigation, Mensuration, Surveying, Linear Drawing, Sacred Music, and a variety of miscellaneous branches. Report Minister Public Instruction 1846, p. 52.

(17) After the transfer to the government the institution continued to be primarily for the education of teachers (Report Minister Public Instruction 1850, p. 26; Report President Board of Education 1872, p. 4) from the middle classes of the Hawaiian people (Report President Board of Education 1886, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: "A year

spent in theological study with a missionary is though sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, The Hawaiian Islands, p. 189.

(18) Until 1863 the principals at Lahainaluna were chiefly missionaries connected with the American Board, and reporting to it as well as to the Hawaiian government.

(19) The curriculum of the seminary underwent little change between the years 1849 and 1877. The following extracts from the reports in evidence are sufficient to indicate the course of study:

"Their studies have been as follows: Algebra, Geometry, Trigonometry, Surveying, Navigation, Natural and Revealed Theology, Natural and Moral Philosophy, Anatomy, Hawaiian Laws, Chronology, Sacred Geography, Sacred History, Geography, Composition, Punctuation and Music."

128 Report Minister Public Instruction 1852, p. 40.

"The following is the course of study pursued by the several classes:

"Fourth or Freshman Class.

"Arithmetic, Geography, Chirography, Punctuation, English Language, Ancient History, Natural History, Chronology, Bible History, Chronology and Geography of the Bible, Hawaiian History.

"Third Class.

"Hawaiian Constitution, Bookkeeping, English, Anatomy, Algebra.

"Second Class.

"Geometry, English Language, Political Economy, Church History, Evidences of Christianity, Natural Theology, Moral Philosophy.

"First or Graduating Class.

"Trigonometry, Surveying, Navigation, Natural Philosophy, Optics, Astronomy, English Language, Theology.

"Compositions, debates and declamations are required through the whole course."

Report President Board of Education, 1862, p. 8.

IV.

Events of 1863, 1864 and 1865.

(20) In 1863 the American Board withdrew from active work in the Hawaiian Islands, and the Hawaiian Mission was reorganized as a self supporting institution under the name of Hawaiian Evangelical Association. The American Board continued to maintain, and still maintains, a fiscal agent whose chief duty in later years has been the payment of salaries to such of the original missionaries as are still living.

(21) In 1864 the board of education laid before Attorney General Charles C. Harris copies of the documents relating to the trans-

fer of the seminary. There is no evidence that this was in answer to a proposal to change the form of religious instruction. The opinion of the attorney general was as follows:

To His Royal Highness The President of the Board of Education:

SIR: Day before yesterday I received from your department a copy of documents relating to the transfer of the Lahainaluna Seminary from the American Board of Commissioners of Foreign
129 Missions to the Hawaiian Government, and an accompanying note desiring my opinion on the same. I scarcely know on what point or points I am required to give an opinion, but have examined them all carefully and although if I had had the transfer to make I should have done it by a deed of conveyance, yet it is my opinion that the government title to the premises is sufficiently good to entitle them to hold possession. But you will see by reference to a letter of the 24th of May, 1849, signed by Mr. Armstrong, and directed to W. P. Alexander, C. B. Andrews and S. N. Castle, appointed to act in the matter for the Mission, that a deed was contemplated where I underscore the words in the copy of documents now returned. This deed ought, in my opinion, to have been executed, yet I say that no one can now dispossess the government, if the government shall keep the conditions of the transfer. The chief conditions of the transfer are contained on the 2nd and 7th pages, and are marked by me in blue pencil. On the 2nd page, "that it shall not teach or allow to be taught, any religious doctrine contrary to the *evangelical* doctrine of the Presbyterian Congregational churches of the United States," and on the 7th page that it shall not teach or allow to be taught any *religious tenet* or doctrine contrary to those heretofore inculcated by the mission which we represent." But they likewise added that the conditions referred to are contained in their Confession of Faith, and therefore, as a legal proposition, I am not obliged to nor can any court go farther, to establish by *other* testimony than *this* paper the doctrines and tenets referred to in the letters of the committee. This seems to have been completed April 28th, 1849, but on a careful examination of the Confession of Faith it seems to me that it does not as far as it goes differ in anything from what is taught in the Roman and Anglican churches—by Methodists and Baptists—and probably some others—it
130 follows that any who teach those doctrines, enumerated in the Confession," and the remainder of whose teachings do not work adversely to those enumerated in the said Confession, may teach in, or even direct the school. This fact seems to have occurred to the committee, probably on rereading and reconsidering their paper, and so on the 8th of May they propose another which is acceded to by the minister. The Privy Council had agreed to the former one on April 27th, 1849, and accepted it on the 28th, and would appear to have closed the matter had not the committee for the mission announced that they would be obliged to refer to the Prudential Committee of the A. B. C. F. M. at Boston, whom they manifestly regard as their superiors. This committee did not act on the propositions till August 21st, 1849, when they passed a reso-

lution, and, judging from the nearness of the date of the 8th of May, the day of desiring to substitute their second Confession of Faith to the 28th of April, the day of making their first proposition, I should have no doubt that it was the second Confession of Faith that was before the Prudential Committee in Boston, and it is very apparent that this Prudential Committee alone had ultimate power in the matter, and that the second confession is the one of binding effect. This differs from the first in no essential particular—*except the last three line article*, and therefore if any sect of Christian teaches the doctrines of each and all these articles they may hold the control of the school. They must in my opinion hold *all* those points, though they may hold *some* more. The last three lines of the 10th article do not seem to me to be a Confession of Christian Faith, but merely a statement of the *discipline* of the organization to which the writers happened to belong, and as I am informed on good authority the custom on such matters differ among Congregationalists, with almost every congregation, and this I suppose to be averred by the words "similar principles" on the 15th. The
131 fair construction of those words, in a legal sense, is that the principles should be identical in all essential points. The question of essentiality is for the Polemicians to determine in the first instance, though eventually if contested it must of course go to the lawyers. Judging from the context and the best light and evidence I can get, the last three lines of the 10th article are unessential as articles of the Christian faith. Should the government not be willing to keep the conditions as far as I have shown them (see page 8th) the property and improvements must be restored to the A. B. C. F. M.

I am sir,

Your Royal Highness' Most Obed. Serv't.

CHARLES C. HARRIS."

Attorney General's Office, October 29th, 1864.

(22) In 1865 a controversy arose over the right of nomination of teachers for the institution as shown by the following correspondence:

LAHAINA, *April 18th*, 1865.

To His Royal Highness, M. Kekuanoa, Pres't of the Board of Education.

SIR: Some months since on behalf of the A. B. C. F. M. I had the honor to present to your Highness the name of the Rev. S. E. Bishop as a candidate for the vacant post at Lahainaluna.

I beg now to add that either of the following named persons would be entirely acceptable to the A. B. C. F. M. in case they should be preferred by His Majesty's Government to the nominee already named, to wit.

The Rev. A. O. Forbes of Molokai, Messrs. D. D. Baldwin of Lahaina, Sandford B. Dole of Koloa, Kauai, or H. R. Hitchcock of Hilo. It is just to them to say that none of them are aware of my having presented their names and I may also add that the

early action of the Board in the matter is very desirable as Mr. Pougue greatly needs help.

I have the honor to be

Your Royal Highness' Ob't Serv't,

SAM'L N. CASTLE,
Agent of the A. B. C. F. M.

Board of Education.

JUNE *9th*, 1865.

Mr. S. N. Castle.

DEAR SIR: I am directed by the Board of Education to
132 state, that they have under consideration your favors of the 18th of April, and 15th of May, last, calling the attention of the board to the vacancy now existing in the second mastership of the school at Lahainaluna, and suggesting certain names from which the board may select a suitable person for that office, and stating that any one of those names would be entirely acceptable to the A. B. C. F. M.

The board desires you kindly to inform them, whether you imply by this expression, that they, the said board have not full liberty to select the masters in question, without reference to any other authorities, and if so, to state the nature of the grounds on which any such claims to interfere, in the internal management of the said school appear to you to be founded.

I have the honor to be, my dear sir,

Your Ob'd't Servant,

W. JAS. SMITH,
Sec. to Board of Education.

HONOLULU, *June 13th*, 1865.

W. Jas. Smith, Esq., Sec. of the Board of Education.

SIR: Your letter of the 9th inst. on behalf of the Board of Education was received on the day of its date.

In reply I beg to remark that the expression quoted by you that certain parties named would be entirely acceptable to the A. B. C. F. M. does not necessarily imply that the Board of Education "have not full liberty to select the masters in question without reference to any other authorities;" but supposing this to be so, in view of the peculiar relations which the seminary at Lahainaluna sustains both to the Hawaiian Government and the A. B. C. F. M., in consequence of the conditions of its transfer from the latter to the former in the year 1849, conditions proposed by the American Mission on behalf of the A. B. C. F. M. and accepted by the King in council and subsequently ratified by the Prudential Committee of the A. B. C. F. M. and by the Hawaiian Legislatures of 1850 and 1858, suggestions respectfully made by the A. B. C. F. M. in regard to the appointment of teachers for the institution, it seems to me, would be entirely proper and entitled to the respectful and courteous consideration of the Board of Education, but as to the *right* to interfere in the appointment of teachers admitting that *literally construed* the terms of the conveyance give no such right and that the American

Board have no right to interfere until something has been taught in the institution contrary to the "Confession of Faith" attached to the conditions of the transfer, if this right was contemplated by not explicitly recognizing a ratifying or nominating power in the A. B. C. F. M. still a just rule of interpretation requires that the general scope of an instrument shall be considered in judging of its meaning and the intention of its author.

In the conveyance itself, or the letter to the government by the committee, stating the conditions upon which the institution was proposed to be transferred and which were accepted by the government with some modifications, there is nothing more evident than that the mission intended carefully to guard against the introduction into the institution of any doctrine, practise or influence antagonistic to its own faith and practise or form of Christian worship.

The letter containing the proposal of transfer and conditions says, "that in the year 1831 the mission commenced the establishment of this institution now known as the mission seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the islands.

133 "From that period to the present time this institution has been unceasingly and anxiously watched over and cherished and cared for by the mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

"Three missionaries have for a large portion of the time been devoted to its interests and two at all times since the two first years of its existence. About seventy-seven thousand dollars have been expended for its benefit including the support of teachers and the dwellings erected for their accommodation.

"This institution has been planted and sustained to the present time by the A. B. C. F. M. from donations given by the American churches for the spread of the gospel in heathen lands."

The letter of the committee in view of then existing circumstances to transfer the seminary to the government with all the rights and interests pertaining to it on condition that it shall carry it on at its own expense and that "it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith inclosed."

Can anything be clearer than that the missionaries contemplated still to have this a co-operating institution to aid them, as it had already done in times past, in the diffusion of solid science and Christianity *as they understood it*, as the benevolent Congregationalists and Presbyterians of the United States, who had contributed to build and sustain the institution understood and practised it? Can it be supposed that its transfer was ratified by the Prudential Committee with any other understanding, that the mission or the A. B. C. F. M. would have consented that an institution planted and built up and cherished and cared for at a heavy expense through a score of years to promote an object dear to them should be given up without the *intention* of so guarding it in the future as to have

it continue to aid instead of defeating the purpose for which it was founded?

It was designed to have not only its teaching but its teachers acceptable to the founders of the institution, and it *seems to me* that the scope of the instrument or letters is so clear that an impartial and careful reader could hardly draw any other inference from a perusal of the correspondence and this I should infer to have been the judgment of at least one member of the Board who, since the vacancy occurred, remarked that he believed the government ought to carry out the agreement in good faith, which policy as a member of the Board I do not doubt but he advocated and which I would be far from intimating the whole Board do not intend to do.

I think the purport and intentions of the negotiators so clear, from the scope of the correspondence and resolutions of the Privy Council, that I could not but regard the appointment of any man not acceptable to the A. B. C. F. M. to the post of teacher in the institution as a violation of the whole spirit of the agreement.

But I remark further as to the intentions of the parties that we are not shut up to the documents themselves in this case (even if in them they have failed to make themselves understood) for the parties are most of them living, and I may add that *I am personally* cognizant of the intentions of the parties in this transaction having been a member of the committee of the mission acting for the A. B. C. F. M. and at the request of my associates in the committee having drawn up both the report of the committee to the mission and the communication containing the proposal of transfer and the conditions specified to the government, and *I know* that the
134 intention was to secure the continued co-operation of the seminary in the work which the American Board was prosecuting here through its mission. I know that it was intended that the teachers should be acceptable to the A. B. C. F. M. and this I also know to have been the view of the government as it was then constituted. The negotiations in reference to the transfer were conducted by Dr. Armstrong, then Minister of Public Instruction, and in these views he not only coincided with the mission but from him I gathered that there was no dissenting voice in the administration. So that neither of the contracting parties supposed that any teachers not acceptable to the A. B. C. F. M. would or could in good faith be appointed by the government for the institution.

In conclusion I beg to say that I understand by the terms of transfer that the government is bound to carry on the institution efficiently under teachers acceptable to the A. B. C. F. M. or failing to do so to reconvey the institution to the A. B. C. F. M. or lastly in case of neither of these to pay over to the A. B. C. F. M. fifteen thousand dollars in specie, the currency of the Sandwich Islands.

Respectfully submitting the foregoing views to the Hon. B'd of Ed'n, I have the honor to remain

Very respectfully,

Your Ob't Serv't,

SAM'L N. CASTLE,
Agent of the A. B. C. F. M.

Board of Education.

JUNE 30TH, 1865.

Mr. S. N. Castle, Agent of the A. B. C. F. M.

DEAR SIR: I am directed by the Board to acknowledge the receipt of your letter of June 13th in reply to mine of the 9th inst. written by their command, and I am further directed to say that they take notice of your remark that the sentence quoted in mine of the 9th does not necessarily imply that the Board of Education have not full liberty to select the masters in question, without reference to other authorities, you have underscored the word "necessarily" and by the remainder of the letter the Board infer that you are of opinion that though the words do not necessarily imply such an idea the claim might still be reasonably advanced. The Board is of an entirely different opinion. In their view a suggestion from those representing the founders of the institution is entitled to a respectful and courteous consideration, but they desire it to be distinctly understood that a right of nomination does not exist, is not hinted at in the deed of transfer, and was not intended to be reserved on the one side or granted on the other. The argument contained in the 3rd, 4th and 5th pages of your letter, if intended to call attention of the Board to facts contained in the deed of transfer, or to direct them in the way of their duty, was unnecessary, and is not in reply to the question contained in my letter. It is understood that the institution is to be continued so as to "aid, instead of defeating, the purpose for which it was founded." And there has nothing been done to justify the intimation that the Board have any desire to defeat such purpose, or introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders. But it is not thought that the personal acceptability or the contrary of the teachers appointed, to those who represent the founders, should weigh at all on the Board,
135 for such an idea would leave the Board the privilege of paying alone, and no authority over the institution.

Not only one member but all the members of the Board understand their duties in this matter, and it is not to be thought that they will not do the duties so understood. And the sole object of the letter of the 9th was to ascertain whether you claimed a right of nomination, which it is understood that you do, as you say that you "could not but regard the appointment of any man not acceptable to the A. B. C. F. M. to the post of teacher as a violation of the whole spirit of the agreement." From this opinion the Board of Education wholly and unequivocally dissent. They are of the opinion that a full compliance with the agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, but the acceptability or the contrary of the person appointed to the A. B. C. F. M. forms no part of the contract, either in letter or spirit.

The Board have appointed Rev'd Sereno E. Bishop, one whom they are glad to know is acceptable, but they have appointed him because they believe that his acquirements and industry will be efficient for the instruction of the youth committed to his charge;

that he is faithful to the native race and dynasty, and his religious views are understood to be in accordance with those held by the Presbyterian churches of the United States.

The Board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract they have to reconvey it or to pay the sum of $15,000.

I am further directed to say that if the views herein expressed are not satisfactory the Board will think favorably of a proposition to reconvey at once.

I have the honor to be, my dear sir,

Your O'b't Servant,

W. JAS. SMITH,
Sec. to Board of Education.

Following this correspondence the board appointed as principal Sereno E. Bishop, who was at the time a missionary of the American Board, and who was the original nominee of Mr. Castle.

V.

Religious Instruction from 1865 to 1877.

(23) Dr. Bishop testified that during his incumbency at the seminary, from 1865 to 1877, while no formal or written religious standard was used at Lahainaluna, nevertheless the doctrines taught by the American Mission were well known and understood, and were accepted as authoritative and taught at Lahainaluna; that the system of doctrine which was taught was substantially the old orthodox Congregational or Presbyterian doctrine; that the evidences of christianity, moral philosophy, Biblical geography, church and Bible history were taught in the curriculum, and that in general
136 there was a course of systematic religious instruction maintained. Upon being shown the substituted Confession of Faith, Dr. Bishop testified that he had never seen it until it was shown him in connection with the present case, but that it very well represented the form of doctrine taught at Lahainaluna.

VI.

Change from Hawaiian into English as Medium of Instruction.

(24) In December, 1876, Sereno E. Bishop, principal of Lahainaluna, wrote the following letter to the president of the board of education:

"To Hon. C. R. Bishop, President of the Board of Education, Honolulu.

"DEAR SIR: In accordance with your request, I have the honor to present my views on the expediency & practicability of adopting the English language as the medium of instruction in Lahainaluna Seminary and on the changes in the curriculum of study which such a change from the Hawaiian would be likely to necessitate.

"It has been apparent to me for some months that the time had

arrived when this change should be made. The greatest objection to it is now in some degree obviated; that it would prevent the mass of the more capable Hawaiian youth from availing themselves of the means of Higher education, which they have hitherto received at Lahainaluna in their own language. The multiplication of English schools for natives has now made it possible for perhaps a majority of Hawaiian lads to acquire such an elementary knowledge of English as would enable them to pursue many elementary studies in that language with profit, and in so doing to qualify themselves for higher studies.

"It seems to be now the fact, that the majority of those Hawaiian parents who are disposed to incur expense for the higher education of their sons, will do so only in schools where they will
137 be likely to acquire a good practical knowledge of English. It has hence resulted, that of late years, our fourth class has numbered, on entering from 12 to 15, whereas they used to be 30 or 40. At the same time the scholars already pursuing the course have for three years past, shown an unusual degree of persistence in remaining, so that our numbers in attendance have not fallen off in the same proportion, we still having 50, in place of 80 a few years ago.

"I have felt a reluctance to propose this change of language, fearing a necessity to omit in consequence, the long-established and highly valued course of instruction, given in this Seminary in certain studies of an abstract nature, which it would only be possible to impart to Hawaiians in their own tongue. These are such as moral philosophy, political economy, evidences of Christianity, and other subjects which have held a leading place in our curriculum, and which require a considerable portion of the time of one teacher. Some instruction in a part of these subjects might possibly be provided for without an increase of the corps of instructors but a part of them would probably have to be omitted, on account of the increased labor devolving on the white teachers, in consequence of teaching so many branches in a language strange to their pupils.

"Could the services of an exceptionally able Hawaiian teacher, such as Rev. M. Kuaea, be secured, some of these subjects might profitably be consigned to his instruction, although no Hawaiian possesses the requisite range of thought and reading to give any considerable ability on such topics.

"As to the most of the other studies pursued, I am convinced that they can be taught with success in English to scholars who on entering are already prepared by two or three years of good study of English. This is especially true of all mathematics in our course, from written arithmetic up to surveying and navigation, in
138 all which the constant repetition of terms and forms of expression immensely facilitates the work.

"The same is true in *Geography*, if books like Cornell's or Mitchell's series are used, where most of the work is in questions of topography, involving the same element of *repetition of forms*.

"*Natural philosophy* and *astronomy*, relating wholly to material and concrete objects, can be taught in English, involving, however, much more labor than mathematics.

"*History*, which occupies a prominent place with us, might be taught by the use of a well-known & excellent Child's History. The *Hawn. Constitution*, being printed in both languages, would be readily taught.

"Physiology, and other branches of natural science can be taught by the use of Hooker's Child's Book of Nature which is written in simple language.

"It would seem necessary, for the efficient prosecution of some of these studies, that *one* of the teachers should possess a tolerable acquaintance with Hawaiian, in order to explain the sense of terms employed. One teacher, if a man of ability, might find ample success, although ignorant of Hawaiian.

"The labor of instruction will be so largely augmented by the use of a foreign tongue, that it would seem necessary, without adding a third white teacher, to abridge materially the present curriculum. But this abridgment need not, in that case, I think, go so far as to radically change the constituted character of the school, as one for Higher Education. It is also to be borne in mind that for those successfully graduating at Lahainaluna, Oahu College will afford the opportunity of further progress, for which they will then be qualified by their attainments in English.

"Very respectfully yours,
(Signed) "S. E. BISHOP."

139 (25) The proposed change was adopted by the board of education upon motion of E. O. Hall, a member of the board, who was at that time fiscal agent of the A. B. C. F. M. It went into effect July 1, 1877. Sereno E. Bishop resigned as principal and became assistant in the North Pacific Missionary Institute which was reorganized the same year under the auspices of the American Board and the Hawaiian Evangelical Association as a training school for Hawaiian pastors and missionaries, and H. R. Hitchcock was appointed principal in his place.

(26) From July 1, 1877, to the present time the principals of Lahainaluna have been neither ministers nor missionaries, and there is no evidence that those representing the mission in Hawaii ever nominated or were consulted in respect to the personnel of the teachers or the principal, or the conduct of the school.

VII.

(27) The following extracts give the curriculum at Lahainaluna since 1877:

"The Board have also, in response to the popular demand, reorganized the National Seminary so as to make the English language the chief medium of instruction. The curriculum of study now embraces, besides the elementary branches, algebra, geometry, trigonometry, mensuration, and surveying, science of common things, bookkeeping, general history, natural philosophy and physiology; all of which are taught in the English language. A few of the studies embracing subjects of moral science, history and political economy have been taught during the past year in Hawaiian; but these are hereafter to be omitted or taught only in the medium of

English. The course also embraces original English compositions and orations and lectures on the science and practice of school teaching.

The nation looks to Lahainaluna as the nursery from which it is to be supplied with teachers, not only for its common schools, but also for its select and English schools."

140 Report President Board of Education 1878, p. 8.

"The course of study occupies four years, and is arranged with a view to give the pupils a good knowledge of English. It embraces instruction in all the Higher Mathematics, in subjects of natural and moral science, history and political economy, and also instruction in the principles and practice of teaching."

Report President Board of Education 1880, p. 17.

"The prescribed course of studies and instruction is arranged for four years. The first year, it comprises a thorough review of the branches usually taught in grammar schools. During the remaining years the course is more extended, including higher mathematics, subjects of natural and moral science, history and political economy. Instruction in music forms a part of the regular exercises of the school. The several classes also have exercises in English composition and declamation."

Report President Board of Education 1882, p. 20.

"The Seminary is a part of the public school system in which instruction is provided in branches of study more advanced than those pursued at the other select schools. The regular course of instruction continues for four years; but pupils may be advanced according to their scholarship when they enter, so as to complete it in a shorter time. Beside a review of the usual common school branches the course of study embraces algebra, geometry, trigonometry, surveying, bookkeeping, history, natural philosophy, moral science, political economy, and physiology, English composition, music, military drill, and instruction in the theory and practice of school teaching. Annual written examinations constitute a very important feature of the Seminary. The promotion of pupils from class to class is based on the results of these examinations."

Report President Board of Education 1884, p. 21.

141 "Course of Study.

"There are five classes in the school, representing five years' work, and the following is the course of study pursued:

"E Class. Reading, from 'Hawaii's Young People'; Drawing and Natura science, observation work; geography, Frye's advanced; literature, De Garmo's Tales of Troy; arithmetic, to percentage, Atwood; agricultural work.

"D Class. Literature, Cook's Ulysses; history, Andrew's Ten Boys; physiology, Blaiswell's How to Keep Well; arithmetic, completed, Atwood; drawing and music; printing.

"C Class. Literature, Black Beauty; history, connected stories from general history; physics, Shaw's physics by experiment; algebra, to unknown quantities, Wentworth; drawing and music; carpentry and wood turning.

"B Class. Literature, Evangeline; history, American, Barnes; grammar; geometry, through circles; drawing and music; carpentry and wood turning.

"A Class. Literature; history, Hawaiian; composition; geometry complete plane; drawing and music; carpentry and blacksmithing."

Report Superintendent of Public Instruction 1900, p. 88.

"Course of Study.

"E Class. Reading from 'Hawaii's Young People', Baldwin's 'Fifty Famous Stories'; Great Americans for Little Americans; Reproduction of Stories; Letter Writing; Drill in Capitalization Punctuation, Paragraphing, Phonics, etc. Memory Selections; Prince's Arithmetic No. IV, completed; Geography; Current Events; Physiology, the Human Body and its Health, by Smith; Music; Mechanical Drawing.

"D Class. Cook's Stories of Ulysses; Blaisdell's Stories from English History; Mother Tongue, Book I; current events; letter
142 writing; short poems memorized; arithmetic, Prince's Book V completed; Frye's geography; Smith's physiology; music; mechanical drawing.

"C Class. Eggleston's First American history; Mother Tongue No. I, reviewed and No. II begun; Dole's Young Citizen; current events; letter writing, arithmetic Prince's Book VI, completed; algebra begun; agriculture, 'Agriculture for Beginners', by Burkett, Stevens and Hill; Frye's geography; bookkeeping and drawing.

"B Class. Eggleston's Advanced American History; Guerber's 'Roman History' (given orally, for oral and written reproduction); current events; Mother Tongue, No. II; Synopsis of Hawaiian Government; letter writing; poems memorized; arithmetic, Prince's Book VII completed; algebra; Frye's geography; bookkeeping; agriculture; 'Agriculture for Beginners,' by Burkett, Stevens and Hill.

"A Class. Alexander's Hawaiian History; national stories, as Jewish Heroes, Cyrus the Great, Pericles, Alexander the Great, Julius Cæsar, Charlemagne, Nelson, Napoleon, etc., given for oral and written production; supplementary reading; current events; letter writing; memory selections; arithmetic, Prince's Book VIII completed; Wentworth's 'First Steps in Algebra,' reviewed; geometry, Wentworth's First Book; Frye's geography completed; bookkeeping; agriculture. In addition to the text books frequent reference is made to the publications of the Department of Agriculture."

Report Superintendent of Public Instruction 1906, p. 16.

VIII.

(28) There is no evidence that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

143 (29) From 1877 until the present date the course of religious instruction has been substantially the same. This includes morning prayer including occasional discussions of passages

of the scripture, compulsory attendance at Sunday school with preparation of the International Sunday school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which the pupils discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. Mr. Macdonald, who has been principal since 1903, testifies that no creed had been taught during that time at the school, but that he had tried to make upright, truthful, Christian men, and held Christ up as the best example to follow; that he had taught nothing about the Pope, or the doctrine of the Trinity, or the doctrine of Adam's Fall, or that the descendants of Adam were without holiness and alienated from God until their hearts were renewed with divine grace; that on Sunday there was a Sunday-school and occasionally, in the morning, a preaching service, in the evening a Christian Endeavor meeting; that the first year he was in Lahainaluna the boys were allowed to go to Lahaina to their own churches, but since then, with the exception of the day scholars numbering ten or twelve, they were required to stay on the grounds on Sunday and attend Sunday school and the evening exercises; that the chapel exercises on weekday mornings lasted about 10 minutes and consisted of a hymn, a portion of the scripture and a repeating of the Lord's Prayer in unison, and occasionally incidental remarks by the principal regarding the passage of the scripture; that there was no direct Christian instruction given in the classroom exercises during the week days other than moral instruction, as teaching the boys to do their work honestly; that the Sunday morning ex-
144 ercises consisted of a regular system of Bible instruction following the International Sunday school lesson series purchased from the Hawaiian Board; that the Sunday school lessons were assigned in advance; that in the Christian Endeavor meetings the Christian Endeavor Topic in a modified form as given in the Christian Endeavor World was usually taken. [illegible] prayers some times offered by the boys and the teachers.

(30) There is no evidence of any protest with regard to Lahainaluna or the course of study there from the American Board or from the Hawaiian Evangelical Association as bodies, but first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board.

IX.

Technical and Agricultural Training.

(31) Technical and agricultural training have been prominent features of the school for over half a century, and the emphasis laid on agricultural work in the past few years does not amount to a change in kind but one in degree. There has been no change in the official designation of the school.

(32) The following extracts from reports show the kind of technical and agricultural training:

"In the high schools at Lahainaluna, Hilo and Waioli, Kauai, and Kohala, Hawaii, a portion of each day is devoted to labor, and with the most beneficial results. The scholars derive a large portion of their support from their own industry."

Report Minister of Public Instruction 1850, pp. 24, 25.

"One great cause of the firm health of these native youth is their occupation, for at least three hours each day, in the cultivation of the soil, for their own advantage. The institution owns a fine tract of kalo land near by, and from this the pupils derive their food and a large part of their living, by the labor of their own hands."

145 Report President Board of Education 1858, p. 12.

"A very important part of the system of education adopted at the Seminary is that of manual labor; important, as it furnishes the means of living to the students, most of whom are poor. At the same time it gives that health and vigor to their physical constitutions so necessary to the student; cultivates habits of industry and economy, and affords some knowledge of the principles and methods of agriculture.

"In this connexion, I am happy to approve very heartily of the suggestion contained in the report of the principal; in regard to the planting of sugar cane on the lands of the Seminary, and hope the means for carrying out the project will be furnished. Should this be done, the students will be greatly benefited by the addition to their means of support, while the institution will share in some degree in the improvement."

Report President Board of Education 1862, p. 9.

"Whenever the locality and opportunities were favorable, a system of labor among the scholars has been promoted, as contributing not only to physical health, but also to the procuring of school books, slates, etc., for the scholars, and making them interested in the cultivation and adornment of their own schools and school land."

Report President Board of Education 1866, p. 3.

"More attention has been paid to the acquisition of the English language, and to industrial and agricultural pursuits, and a marked improvement both in the scholars and in the lands of the Seminary has been the consequence."

Report President Board of Education 1868, p. 3.

"Manual labor is also an important part of the system of education at the Seminary. It furnishes the pupils the means of living; gives health and vigor, and habits of industry and economy."

Report President Board of Education 1882, p. 20.

146 "Agricultural labor is also an essential feature of the school. By it the pupils furnish all their table supplies. During the past year a carpenter's shop has been built and fully equipped with benches and tools for the use of pupils. The operations of the shop have been already noticed in this report."

Report President Board of Education 1884, p. 21.

"At Lahainaluna industrial training is given in agriculture, carpentry, mechanical drawing, printing, etc., and the students raise most of their own food. It is proposed that still more prominence shall be given to agricultural training in that school. For the ma-

terials and tools required in these lines of industrial labor a small appropriation will be asked for."

Report President Board of Education 1896, p. 7.

X.

(33) During the session of the Legislature of 1903 there was a movement to obtain the federal aid available for agricultural colleges, in connection with which the following opinion was rendered by the then Deputy Attorney General:

MARCH 31, 1903.

"Honorable S. W. Wilcox, Chairman of the Senate Committee on Public Lands.

In regard to the title of the Government to the premises of Lahainaluna Seminary so far as it affects the question of whether or not such Institution is a Sectarian Institution within the meaning of Section 55 of the organic act, prohibiting the appropriation of public money for the support or benefit of any sectarian, denominational or private school or any school not under the exclusive control of the Government.

"DEAR SIR: Referring to your request of March 30, wherein you requested that I give*n* an opinion to you in answer to the
147 resolution of the Senate of the Hawaiian Islands, that the committee of Public Lands be requested to investigate the Government titles in Lahainaluna premises and make a report thereon, and would say that I have covered all the facts I could in the short time and will summarize them in my report.

In my investigation I have been assisted by Wm. R. Castle, former President of the Board of Education, who at one time investigated these facts. He volunteered to assist the Government in this matter and thanks are due to him.

I also submit a copy of an opinion by Attorney General Harris, rendered to the President of the Board of Education October 29, 1864, a copy of which I herewith forward to you. By this opinion it is evident that on October 29, 1864, there was no deed of conveyance from the A. B. C. F. M. to the Hawaiian Government and, therefore, the possession of the Government rests upon the correspondence between Mr. Armstrong, Minister of Public Instruction, and the committee of the Mission and to these documents only are we to go for the facts. The Attorney General, in 1864, expressed the opinion that "this deed ought, in my opinion, to have been executed—yet I say no one can now dispossess the Government if the Government shall keep the conditions of the transfer."

I see no reason to differ with the learned opinion of Honorable C. C. Harris in this matter so far as the conditions have not changed, but I have been informed of facts which were not known to him at that time, I presume, which would make it necessary to take steps to protect the Government title to this Lahainaluna Seminary premises. This I will refer to later and wish now to clearly state the conditions under which the Government took these premises.

The correspondence between the Hawaiian Missions as a com-

mittee of the A. B. C. F. M. with the Minister of Public Instruction, copies of which you handed me, show clearly the conditions
148 of the bargain between the mission and the Government. In a letter of April 25, 1849, the committee wrote to the Minister of Instruction giving a brief history of the Mission, stating that in the year 1831 the mission commenced the establishment of the institution known in 1849 as the Mission Seminary Lahainaluna, to promote the diffusion of enlightened literature and Christianity throughout the Islands. It was supported by the Mission up to the time of writing the letter, when the embarrassed financial condition of the Board made it necessary to negotiate with the Government in order to turn the support of the institution over to the Government. Accordingly, this offer was made offering the buildings and lands without describing them particularly, except as "all lands pertaining to and granted for the use of the said Mission Seminary."

There is no other description of these lands to be found. No other description or deed has been known by the Surveyor of the Territory or President of the Board of Education, or Mr. Cooper, Superintendent of Public Works, although the Surveyor, W. E. Wall, says that he is informed that the American Board of Commissioners for foreign missions were granted these premises by Governor Hoapili of Maui and others some time about the beginning of the institution, 1831, but all written evidence of this fact has disappeared. It may be that at the Boston headquarters of the Board they can find these documents. The year 1831 was about twenty years previous to the establishment of an office for the recording of conveyances of title to land and, therefore, it is not surprising that there is no record of such a transfer.

It should also be noted that at this time the statute creating commissioners for confirming title to land was in force and the period within which title should be confirmed had not expired. If the Government took the land under the conditions stated, the Board would naturally not seek a Land Commission Award and
149 Royal Patent on the same, as they would, had this transaction not taken place. For these reasons it is easy to understand why we find no Land Commission Award covering the premises claimed by the A. B. C. F. M. except two awards which cover a large tract surrounding these premises, one of which includes most of the lands and buildings claimed for the Seminary included in the land at Kuia, Lahaina, Maui, described in L. C. A. 7716 on which Land Patent 8146 was issued to Ruth Keliikolani, on September 10, 1902, being Apana 11 thereof, containing an area of 2058.5 acres. The Trustees of the Bishop Estate hold as successors of Ruth.

A quit claim deed from them should be sought by the Government for the Board, as the Government have held these premises since 1831 adversely to any such claim. From this it is seen that the title to these lands is by adverse possession only, unless the Boards in Boston can show the ancient deeds.

Having investigated the Land Patents referring to these lands as well as I could, in the short time given, I shall assume that the Gov-

ernment has the prescriptive title to these lands by possession since 1831, under a deed from Hookili and others and that the Board owned the title up to the time of April 25, 1841, nothing to the contrary appearing.

At this time the letter of April 25, 1849, by the committee of the Mission to the Minister of Instruction, after reciting the history of his school, made an offer of the lands and buildings "to the Hawaiian Government for its use and benefit and behoof, to have and to hold the same forever."

"Provided However, and this transfer is made upon the express conditions, that the Hawaiian Government agrees, that the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science; and further, that it shall not teach, or allow to be taught any religious tenet
150 or doctrine contrary to those heretofore inculcated by the Mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed and that in case of the non-fulfillment or violation of the condition upon which this transfer is made by the said Hawaiian Government, the whole property hereby transferred hereinabove specified together with any additions or improvements which may have been made upon the premises, etc., shall revert to the said Mission, etc.

These propositions, if accepted by the Hawaiian Government, shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board of Commissioners of Foreign Missions in Boston, etc."

The first profession of faith is then set forth. To this letter of April 17, 1849, the Minister of Public Instruction answered, stating that their proposal had been received and made certain modifications of their propositions in the form of resolutions of his Majesty's Privy Council. The pertinent resolution effecting this inquiry is resolution No. 1.

"Resolution No. 1. That the above proposals be accepted, subject to the ratification of the Legislature; provided that in case of the nonperformance on the part of this Government of the conditions specified in the letter of the above named gentleman (referring to the committee of the American Board) it shall be optional with the Government to allow the institution with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes than those of education, it shall be at
151 liberty to do so, on condition that it sustain an institution of like character, and on similar principles in some other place on the islands or pay the sum of $15,000 to such Mission in behalf of the Mission Board in Boston."

"Resolution No. 5. Certain lands belonging to the Government in Kaanapali should be purported to the use of the Seminary to be disposed of etc."

To the letter of April 27, 1849, the committee of the Mission wrote to the Minister of Public Instruction accepting the modifications of the offer and referring to certain resolutions of the general meeting of the Mission April 28, 1849. In this resolution marked first, language is used which explains the lack of the conveyance, for the words are "if further testimonials of conveyance etc., be deemed necessary by the said Government, the Minister of Public Instructions etc. be requested to make or cause to be made out duplicate copies of said instruments of conveyance comprising all the particulars, etc."

So far as known no conveyance was ever made. On May 8, 1849, a new Confession of Faith was submitted to the Government and on May 24, 1849, the Government accepted this modification of the condition of trust. This letter refers to incorporating this Confession of Faith in a deed of transfer when a deed is made and states that no deed can be made until the transaction is ratified by the American Board and the Legislature of the Islands. In March, 1850, S. N. Castle wrote to the Minister of Public Instruction informing him that the transaction was ratified by the American Board giving a copy of the resolution, and later the transaction was ratified by the Hawaiian Government in a resolution set forth in Section- 738, 739, 740 of the Civil Code of 1859. Thus we see that the offer on the part of the Mission was first: that an institution for the cultivation of sound literature and solid science be maintained
152 and second that it shall not teach or allow to be taught any religious tenets or doctrine contrary to those heretofore inculcated by the Mission, a summary of which was set forth in modified form in the letter of May 8, 1849, from the Committee to the Minister of Public Instruction and the modified Confession of Faith accepted by the Government.

Then the question narrows down to this point: Section 55 of the Organic Act of the Territory of Hawaii, holds that "No public money be appropriated for the support, the benefit of any sectarian, denominational or private school or any school not under the exclusive control of the Government." As far as the first requirement is concerned the school must be maintained for the cultivation of sound literature and solid science. If it is in the contemplation of the Legislature to abolish the cultivation of sound literature at the school and to substitute therefor either "the cultivation of solid science" either in the form of an agricultural college alone or otherwise, then this provision of the trust will be violated. Both must be taught.

The second condition of the trust is negative, reading as follows: "That it shall not teach or allow to be taught any religious tenets or doctrine contrary to those heretofore inculcated by the Mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed." The Confession of Faith there referred to was abandoned and the one referred to in the letter of May 8, 1849, substituted in its place with the consent of the Government dated May 24, 1849.

The opinion of Mr. Harris rendered in 1864 interpreted the meaning of these tenets.

So long as the Government maintains this school it shall not teach any doctrine contrary to such Confession of Faith, but it is not

compelled to teach any religious doctrine whatever and therefore in my opinion can not be held to be a sectarian institution.

153 The Territory controls the school and is prevented from teaching any sectarian doctrine by this Organic Act. By teaching any sectarian doctrine whatever the Territory would be certainly in violation of the second condition of the trust.

There is another point, however, which may well be considered, if money is about to be appropriated for the turning of this school into an agricultural college and the abandonment of the cultivation of sound learning. Under the conditions of acceptance of the Government, the Government can, by paying $15,000 release itself from any conditions of the trust, and by this means divert this establishment to other purposes, than those of education. The premises would become Government property and could be disposed of at will of the Territory and without any conditions. Thus any question as to the perpetual condition that sound literature can be taught can be avoided and the land and premises used for best interests of the Territory, either by maintaining a school or by disposing of the lands to strangers without limit.

In conclusion, from my investigation, I believe that the title is in the Government subject to these conditions and that the school is not a sectarian institution under the prohibition stated in Section 55 of the Organic Act.

Very respectfully submitted,

(Signed) PHILLIP L. WEAVER,
Assistant Attorney General.

XI.

(34) Prior to the beginning of the action a correspondence took place between the Governor of Hawaii and the Trustees, as follows:

MAR. 1, 1904.

"F. J. Lowrey, Esq., Honolulu.

DEAR SIR: A note from Rev. O. P. Emerson states that you

154 and Mr. W. O. Smith are the Trustees for the property of the American Board of Missions in the Islands here, and I desire your assistance in securing, if possible, a further quit claim deed to the Lahainaluna site, and would like to see you some time about it. Be good enough to telephone up and arrange with Mr. Buckland for an engagement that will be convenient to you.

Very sincerely yours,

G. R. CARTER, *Governor.*"

HONOLULU, T. H., *March* 2, 1904.

"Honorable G. R. Carter, Governor Territory Hawaii, Honolulu, T. H.

DEAR SIR: Yours of March 1st relative to matters between the Trustees of the American Board and the Lahainaluna site, is received, and in answer thereto, I would say that the Trustees appointed were Messrs. W. O. Smith, Henry Waterhouse and myself, and the Trust Deed requires the approval of at least two to complete

any matter of business. No notice of appointment of a successor to the late Mr. Henry Waterhouse has been received, and Mr. W. O. Smith is absent from the Territory, so that until a new appointment is made, and person appointed has qualified, or until Mr. Smith's return, no decisive step can be taken. Probably, it would be as well, therefore, to let the matter stand until there are at least two Trustees here, and then the matter can be taken up with you, and no doubt, carried to a speedy conclusion.

If, upon this explanation, you still cafe to see me personally about it, if you will kindly let me know by telephone or otherwise, I shall be glad to make such an engagement as you suggest.

Yours very truly, F. J. LOWREY.

155 HONOLULU, *March* 11, 1904.

"Mr. Fred J. Lowrey, Honolulu.

DEAR SIR: Enclosed you will find copy of documents relating to the property of the Department at Lahainaluna, Maui, the same being forwarded by direction of the Superintendent of Public Instruction at the request of the Governor of the Territory.

Very respectfully, C. T. RODGERS,
Secretary."

HONOLULU, HAWAII, *March* 14, 1904.

Mr. C. T. Rogers, Secretary Dept. Public Instruction, City.

DEAR SIR: Your letter of March 11th enclosing papers relating to Lahainaluna property is received. The matter will be submitted to the attorneys for the trustees as to what interest said trustees have in the property, and their right to dispose of same.

Yours very truly, F. J. LOWREY.

HONOLULU, HAWAII, *March* 14, 1904.

"Mr. W. R. Castle, City.

DEAR SIR: The present trustees of the American Board property in Hawaii, are Messrs. W. O. Smith, G. P. Castle and the writer. The territorial government is desirous that the trustees give to it a quit claim of any interest they may have in the Lahainaluna property, with which you are familiar.

156 We understand it is the intention to start an Agricultural College there, it being expected that the Federal Government would appropriate an amount, say of $20,000.00 a year toward the support of such an institution, providing it was started, and the title to the property was perfect in the territorial government. The trustees would ask an opinion, therefore, from you as to what their interests in the property are, and also as to whether they would have a right under their trust deed to dispose of the property for their interest in same, or whether such a transfer, if made, would have to be by the American Board itself, and whether such Board would have the right to make such a transfer under the circumstances and conditions on which it originally received the property.

An early reply is respectfully requested.

Yours very truly, F. J. LOWREY."

(35) At a conference a few months prior to the commencement of the suit an oral demand was made on the Governor of the Territory and the Superintendent of Public Instruction by plaintiffs' attorney either to pay plaintiffs $15,000 or to reconvey the property to the American Board or to the plaintiffs, which demand was refused.

XII.

Title of plaintiffs. (36) The claim of the plaintiffs to maintain this action is based upon the following indenture, under which George P. Castle has been duly substituted in place of Henry Waterhouse.

157 This indenture made this 25th day of July A. D. 1903, between the American Board of Commissioners for Foreign Missions, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, in the United States of America, hereinafter called the "Grantor," party of the first part, and F. J. Lowrey, Henry Waterhouse and William O. Smith all of Honolulu, Island of Oahu, Territory of Hawaii, United States of America, hereinafter called the "Trustees," parties of the second part,

Witnesseth: That whereas the said Grantor is the owner of certain lands, tenements, hereditaments and the appurtenances thereto belonging, situate in the Hawaiian Islands hereinafter described and referred to, and is desirous of contributing to the support and maintenance of the Board of the Hawaiian Evangelical Association, an Hawaiian eleemosynary corporation organized and established for the corporate purpose of mutual counsel and assistance in the great work of propagating Protestant Christianity, and to enter into common measures for promoting knowledge and religion, and for preventing infidelity, error, and immorality; and said Grantor proposes now to convey the said lands and property, hereinafter particularly described and referred to, in trust for the use, benefit and behoof of the said Board of the Hawaiian Evangelical Association, to the extent and in the manner hereinafter set forth, in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands, and to that end it has been agreed between the parties hereto and said intended beneficiary that these presents shall be executed:

Now therefore, the said American Board of Commissioners for Foreign Missions, hereby expressly revoking and annulling any and all powers of attorney and grants of authority heretofore at any time by it given to any person or persons whomsoever, so far

158 as the same shall or may in any manner or degree relate to any or all of the property affected hereby, in consideration of the premises and of the acceptance by said Trustees, hereinafter expressed, of the trusts hereof, and the covenants herein contained on the part of said Trustees and their successors in said trusts to be kept and performed, and also of the sum of Five Dollars ($5) to it paid by said above named Trustees, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell, convey and

confirm unto the said F. J. Lowrey, Henry Waterhouse and William O. Smith, all and singular the lands and real estate situate in said Territory of Hawaii belonging to said Grantor, described and particularly referred to in the schedule hereunto annexed, marked "Schedule A," reference to which is hereby made and the same made a part hereof, together with all other lands in the possession of or belonging to said Grantor or in or to which said Grantor has any right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intents and purposes as though a particular description thereof were herein incorporated and included in said Schedule; saving and excepting only, from the operation and effect of this instrument that certain lot of land situate on the South corner of the intersection of Alexander and Dole Streets, in said Honolulu. Known as the "Bingham Lot" (Lot No. 28,) containing an area of 1.06 acres, described in a certain deed to said Grantor dated June 6, 1881, of record in the Registry Office in said Honolulu in Liber 68 on pages 337 and 338.

Together with all and singular the tenements, hereditaments, rights, privileges, and easements thereunto belonging or in anywise appertaining, and the improvements thereon.

To have and to hold the same, unto the said F. J. Lowrey, Henry Waterhouse and William O. Smith, and their successors in
159 trust and assigns, forever, in trust nevertheless, for the following uses and purposes, that is to say:

First. To hold, manage and control the same, and receive and take the rents, issues, profits, income and proceeds of sales and authorized mortgages thereof, and hold such increment and realizations under the same trusts as the above granted trust property, using and applying the same, however, in the manner hereinafter provided.

Second. In their discretion to allow and permit the said Board of the Hawaiian Evangelical Association (hereinafter called the "Beneficiary") to use and occupy such parts or portions of the said trust property as it may desire and the said Trustees deem expedient and proper, for any purpose or purposes which may be authorized by its corporate Charter or By-Laws without the payment by it of any rents therefor; provided, that this shall not be construed to mean that said Beneficiary shall be entitled as of right to so use or occupy any part or portion of said trust property without the payment by it of any or all taxes, charges, or impositions levied or imposed upon such part or portion by governmental or municipal authority.

Third. At any and all times in their discretion, whether for the purposes of providing necessary funds for the proper maintenance and preservation of the trust property, including the payment of debts incurred or to be incurred, or otherwise, to sell and convey or lease any portion or portions of said trust property to such persons or corporations, for such considerations and sums and upon such terms and conditions as shall to said Trustees seem for the best interests of said trust estate and said Beneficiary. With full power and authority in any and all cases of sale of any of said trust property under any provision of this instrument, to make, execute ac-

knowledge and deliver, to such person or persons, corporation or corporations, good and sufficient deeds of conveyance; and such
160 deed or deeds shall operate to convey the property sold in fee simple absolute, freed and forever discharged from the trust of these presents, with like effect, in every such case, as though said Trustees were the sole and absolute owners in fee of said property in their own personal right. No purchaser shall be required to answer for the application of the purchase money.

Fourth. To convey any of the real property of said trust estate to any person or persons, corporation or corporations, and in consideration therefor and by way of exchange, to accept the seizin and conveyance of any other lands and property. And any and all property received by said Trustees or their successors by way of exchange under any provision of this instrument, shall take the place of the property conveyed therefor, and the title thereto shall immediately vest in the then Trustees hereunder and be and become subject to the terms, trusts and conditions of these presents in like manner as was the property in the place of which it shall have been received.

Fifth. Subject to the written ratification of said Grantor, to mortgage or pledge any part or portion of said trust property, to such person or persons, corporation or corporations, for such amounts and upon such terms as said Grantor shall in writing theretofore authorize and approve; and in each such case, to make, execute, acknowledge and deliver a good and sufficient instrument of mortgage or pledge; and the same shall operate to convey the property so mortgaged in fee simple absolute, and freed and forever discharged of the trusts of these presents, conditional upon the terms thereof.

Sixth. And generally, to do and perform every act and thing and exercise every power and authority whatsoever, not herein specifically denied or withheld from or herein directed to be otherwise done or exercised by said Trustees, as fully and to every
161 intent and purpose as though the said Trustees were the absolute owners in fee in their own personal right of the property hereby conveyed.

Seventh. Any and all moneys arising from or out of the property of the trust estate, whether by way of rents or other issues and income or from sales or mortgages thereof, shall be received and held by said Trustees and applied in the manner following:

1. To pay, satisfy and discharge any and all taxes, assessments and charges by lawful authority imposed upon, and all costs and expenses for the proper maintenance and preservation of, said trust estate.

2. To the payment of all debts due from said Trustees on account of said trust estate, which may become chargeable against said trust property or any part thereof.

3. To the payment to said Trustees of a reasonable commission, not exceeding two-and-one-half per cent. (2½%) on the income, and one per cent. (1%) upon the proceeds of sales, by way of compensation to them for their services as trustees hereunder.

4. After the payment of such taxes, assessments, debts, charges, expenses and commissions, and until otherwise directed by said

Grantor, to pay over and deliver to said Beneficiary, from time to time, any balance or portion of the moneys then remaining in their hands over and above what may in their judgment be required for the current expenses connected with the said trust. Any unapplied balance to be placed on general deposit, or, the said Trustees may invest the same upon such security as they may approve.

It is hereby expressly declared and agreed, as an express condition of this instrument, that said Grantor shall in no case be or become responsible for any indebtedness or obligation connected with or arising out of the administration of the trusts hereof, or in relation to said trust property or any part thereof, or interest therein, of any nature or kind whatsoever.

162 In case the said Trustees or any of them or any successor or successors of them or either of them duly appointed hereunder shall die, go abroad to reside, or desire to retire from or refuse or become incapable to act in the trusts hereunder, or shall be removed, or there shall otherwise be any vacancy in the office of any Trustee, then and in every such case a new Trustee, who shall be a person resident in said Hawaiian Islands, shall be appointed by the said American Board of Commissioners for Foreign Missions in the place of the Trustee so dying, going abroad to reside, or desiring to retire from or becoming incapable to act, or to fill such vacancy, as aforesaid, such appointment to be evidenced by a certificate in writing signed by the Treasurer, and under the seal of said corporation, Grantor, such certificate to be properly acknowledged and authenticated and to be duly recorded in the office of the Registrar of Conveyances in said Honolulu. And thereupon such certificate shall constitute and be the sole and only authority requisite to the valid appointment of any trustee under these presents; and upon every such appointment the trust premises shall thereupon become vested in the new trustee either jointly with the continuing Trustee or Trustees, or solely, as the case may require; and such new trustee shall have and exercise all the powers and authority and be subject to all the same obligations and duties of the trusts hereof as though he were originally named as a Trustee herein.

Any two Trustees hereunder shall have full power to act in the administration of the trusts of these presents and effectually to execute the powers and duties herein imposed upon the Trustees; and the joint act of not less than two Trustees shall be necessary for the effectual accomplishment of any act, power or authority herein authorized, directed or given.

The said Grantor does hereby expressly reserve unto itself as an express condition hereof, the full right and authority at any 163 time or times, to direct any change or alteration in the disposition of the income and proceeds of the trust estate, and in its full discretion to remove any Trustee or Trustees appointed pursuant to any provision of this instrument, and to fill any and all vacancies in the office of any Trustee howsoever arising or occurring.

And the said F. J. Lowrey, Henry Waterhouse and William O. Smith for themselves and their respective successors in the trusts of these presents, do hereby accept the conveyance of the property hereinabove set forth, mentioned and referred to, and the trusts of

these presents, and agree to well and faithfully perform and carry out the same to the best of their ability, according to the true intent and meaning thereof.

In witness whereof, the said American Board of Commissioners for Foreign Missions, has hereunto set its common seal, and caused these presents to be subscribed in its name and behalf by Frank H. Wiggins, its Treasurer, (the officer designated by the Charter of said corporation to authenticate its deeds) hereunto duly authorized, and the said F. J. Lowrey, Henry Waterhouse and William O. Smith have hereunto set their respective hands and seals the day and year first hereinabove written.

AMERICAN BOARD OF COMMISSIONERS
FOR FOREIGN MISSIONS,
By ITS TREASURER,
(Signed) FRANK H. WIGGIN,
Treasurer American Board of Commissioners for Foreign Missions.

F. J. LOWREY. [SEAL.]
HENRY WATERHOUSE. [SEAL.]
WILLIAM O. SMITH. [SEAL.]

TERRITORY OF HAWAII,
Island of Oahu, ss:

On this 12th day of August A. D. 1903, personally ap-
164 peared before me F. J. Lowrey, Henry Waterhouse and William O. Smith, all known to me and known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

PERCY M. POND,
Notary Public, District of Honolulu.

UNITED STATES OF AMERICA,
Commonwealth of Massachusetts,
County of Suffolk, City of Boston, ss:

On this 25th day of July A. D. 1903, before me Harwood S. Palmer, Notary Public in and for the County of Suffolk, Commonwealth of Massachusetts, residing therein, and duly commissioned and sworn, personally appeared Frank H. Wiggin, known to me to be the person described in and who executed the foregoing instrument on *the* behalf and as the Treasurer of the American Board of Commissioners for Foreign Missions, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, who upon oath deposed and acknowledged to me that he did on behalf, and as the duly elected, qualified and acting Treasurer of, said Corporation, and by and under its specific direction as its free act and deed, sign and execute the said instrument and thereunto affix the seal of said Corporation; and that said corporation so executed the same freely and voluntarily and for the uses and purposes therein set forth.

(Signed) HARWOOD S. PALMER, [SEAL.]
Notary Public.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

I, John Noble, Clerk of the Supreme Judicial Court of said
165 County (said Court being a Court of Record), do hereby certify that Harwood S. Palmer whose name is subscribed to the annexed certificate of acknowledgment, was, at the date of the same, and now is, a Notary Public in and for the said County of Suffolk, residing therein, duly qualified, commissioned and sworn; and as such officer is authorized to administer oaths and take acknowledgments of instruments, and that full faith and credit are due to all his official acts as such Notary Public. And I do hereby further certify that the signature attached to said annexed certificate of acknowledgment is his proper signature and is genuine.

In witness whereof, I have hereunto set my hand as such Clerk as aforesaid, and affixed the seal of said Supreme Jud. Court this 25th day of July, A. D. 1903.

JOHN NOBLE,
Clerk of the Supreme Judicial Court of said County.

SCHEDULE A.

List of A. B. C. F. M. Properties in the Territory of Hawaii, May, 1903.

I. Kawaiahao Seminary Premises, Honolulu.
II. Hyde Premises, "
III. Emerson Premises, "
IV. Kaumakapii Church Lot, "
V. School Lot, Hilo.
VI. Haili Church Lot, Hilo.
VII. Haili Parsonage "
VIII. Church Lot, etc., at Hana, Maui.
IX. Parsonage, etc., at Ewa, Oahu.
X. Parsonage, etc., at Wainee, Kauai.
166 XI. Church Lot at Honuaula (Ulupalakau), Maui.
XII. Lots in Waialee and Kaunala, Oahu.
XIII. Thurston Premises, Kailua, Hawaii.

Prepared by

ARTHUR C. ALEXANDER,
Surveyor.

I. Kawaiahao Seminary Lot.

Apana 1 of R. P. 1944 to E. W. Clarke conveyed by E. W. Clarke and wife to the A. B. C. F. M. by deed dated March 16, 1868, and recorded in liber 25, pages 212 and 213; portions of L. C. A. 269 to John Li and R. P. 1958, No. 15, to Castle and Cooke, conveyed by W. R. Castle and wife to the A. B. C. F. M. by deed dated January 5, 1889, and recorded in liber 112, page 383; No. 14 of R. P. 1958 to Castle and Cooke for the A. B. C. F. M.; a portion of the old "Printer's Lane"; and a portion of L. C. A. 2293 to Kalaiheana.

Notes of Survey.

Beginning on the mauka side of King Street at the west corner of the Castle Home premises and running by true bearings:

1. N. 60° 25′ W., 219.1 feet, along King St., to an angle in the street.
2. N. 57° 30′ W., 30.5 feet along King St., to the premises of the Territorial Stable Co.
3. N. 39° 17′ E., 310.0 feet to the southwest side of Printer's Lane.
4. S. 24° 25′ E., 93.4 " along Printer's Lane to the rear gate of the seminary.
5. S. 71° 05′ E., 13.3 feet across gate.
6. N. 65° 55′ E., 15.0 " along Schnack's lot.
7. S. 69° 01′ E., 178.8 " along Schnack's lot and the Pahau Estate.
8. S. 65° 58′ W., 107.5 " along S. N. Castle Estate, Ltd.
9. N. 64° 28′ E., 3.25 " along the Castle Home premises.

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10. S. 32° 20′ E., 207.0 feet along the Castle Home premises to the point of commencement.

Area = 1.53 Acres.

ARTHUR C. ALEXANDER,
Surveyor.

May 21, 1903.
Map No. 1.

II. Hyde Premises.

A portion of R. P. (Grant) 208 to W. L. Lee, all of R. P. (Grant) 73 to J. Knight, and a portion of R. P. (Grant) 11 to Limahauna, comprising Lots 37, 36, 24, 25, and the western halves of Lots 35 and 26, being the premises conveyed to the A. B. C. F. M. by R. H. Hitchcock and wife by deed dated June 27, 1877, and recorded in liber 51 page 57, less a strip 10 feet wide taken by the government for widening Beretania Street.

Notes of Survey.

Beginning at a point on the makai side of Beretania Street 457.6 feet from the west corner of Beretania and Kapiolani Streets and running by true bearings:

1. N. 68° 48′ W., 253.8 feet, along Beretania Street.
2. S. 20° 22′ W., 295.2 " " property of T. G. Thrum.
3. S. 68° 56′ E., 249.8 " " the mauka side of Young Street.
4. N. 21° 07′ E., 294.5 " to the point of commencement.

Area = 74,150 sq. ft. or 1.70 acres.

ARTHUR C. ALEXANDER,
Surveyor.

May 21, 1903.
Map No. 2.

III. Emerson Premises.

A portion of L. C. A. 804, R. P. 2467 to Kaluahinenui, and also a portion of L. C. A. 136 and 137, R. P. 419, to Maalahia, being
168 the premises conveyed to the A. B. C. F. M. by Hugo Stangenwald by deed dated October 15, 1882, recorded in liber 74, page 405, less a strip taken by the government for widening Beretania Street.

Notes of Survey.

Beginning at a point on the makai side of Beretania Street, bearing N. 56° 05′ W., true, 93 feet from an angle in the road, and running by true bearings:

1. S. 43° 55′ W., 92.7 feet, along Stangenwald lot.
2. Thence to the left on a curve of 17 feet radius for a distance of 14.2 feet. Thence—
3. S. 32° 35′ E., 64.7 feet along Stangenwald lot.
4. S. 52° 50′ W., 154.6 " " Metcalf lot.
5. S. 36° 45′ E., 247.0 " " " " to Alapai Street.
6. S. 46° 00′ W., 20.2 " " Alapai Street.
7. N. 36° 45′ W., 252.0 " " H. Parker's Lot.
8. S. 63° 20′ W., 91.3 " " " "
9. N. 32° 15′ W., 192.0 " " " "
10. N. 50° 15′ E., 130.5 " "
11. S. 35° 40′ E., 104.2 " " Ross Lot.
12. N. 52° 42′ E., 217.0 " " " "
13. S. 56° 05′ E., 26.0 " " the makai side of Beretania street to the point of commencement.

Area = 1.15 Acres.
Map No. 3.

IV. Kaumakapili Church Lot.

L. C. A. 387, Part 1, Sec. 1, No. 6, to the American Mission, Royal Patent 1958, No. 12, to Castle and Cooke for the A. B. C. F. M.

169 *Notes of Survey.* (*From Original Survey by T. Metcalf.*)

Commencing at makai south corner of this lot on mauka side of Beretania Street, at bell house and running:

N. 50° 45′ W., 2¼ Ch. along Beretania Street to Kalanikahua's premises at west corner of this lot.
N. 50° 00′ E., 3 ch. 10 ft. along Kalanikahua's lot to mauka north corner of this lot.
S. 40° 00′ E., 1 ch. 58 ft. along Kapena's and Kenia's lot to mauka east corner of this lot.
S. 43° 15′ W., 2 ch. 51.5 ft. along Konia's premises to the place of commencement.

Area = 26,450 sq. ft.
Map No. 4.

V. School Lot on Miller Street.

Land conveyed to the A. B. C. F. M. by the Republic of Hawaii by Patent 3786, Grant, to the A. B. C. F. M., in exchange for school lot on Smith Street.

Notes of Survey. (*According to Description in Patent.*)

Commencing from a point on the N. W. side of the Queen's Hospital grounds, 158 feet from the North angle of said grounds, where by the magnetic meridian of this survey the East angle of the Hospital Building bears S. 16 35′ W. and Punchbowl triangulation signal N. 39° 30′ E.

1. N. 27′ W., 136 feet along Crown Land.
2. S. 62° 15′ W., 51 feet along road.
3. S. 27° 40′ E., 136 feet along Kaui's Land.
4. N. 62° 15′ E., 49.5 feet along Hospital grounds to initial point, containing 6,800 Square Feet, more or less.

Map No. 4.

170 VI. Haili Church Lot, Hilo.

A portion of R. P. 1600, Section I, Part 4, and also a small portion of L. C. A. 5701, R. P. 1155 to Kaiu, conveyed to the A. B. C. F. M. by J. K. Akina by deed dated March 15, 1887, recorded in liber 104, page 108.

Notes of Survey. (*Compiled from Deeds, etc.*)

Commencing at the west corner of Church and Pleasant Streets and running:

1. S. 51° W., 212 feet, along Church Street.
2. S. 39° E., 241 "
3. N. 51° E., 202 " along parsonage of foreign church.
4. N. 36° 45′ W., 241 feet, along Pleasant Street to point of commencement.

Area = 49,890 sq. ft. or 1.14 Acres.
Map No. 4.

VII. Haili Church Parsonage, Hilo.

A portion of L. C. A. 2228, R. P. 1152, to Kaapa conveyed to the A. B. C. F. M. by the heirs of D. B. Lyman by deed dated March 9, 1889, recorded in liber 117, page 177.

Notes of Survey. (*According to Description in Deed.*)

Beginning at the west corner of award to Nahalelepo and running:

S. 38° E. 52 feet along said award.
S. 53° 45′ E. 44 feet along said award.
S. 50° 30′ W. 234½ feet along Mareka liilii to Pleasant St.
N. 37° 30′ W. 80 feet along street.
N. 46° E. 211 feet along lots of A. B. C. F. M., C. E. Richardson, & H. Porter.
171 N. 50° E. 16⅔ feet along lots of A. B. C. F. M., C. E. Richardson, & H. Porter to the point of commencement.

Area = 0.45 Acres.
Map No. 4.

VIII. Church Lot, etc., at Hana, Maui.

R. P. 1958, No. 1, to Castle and Cooke for the A. B. C. F. M. covering Mission Premises in Wananalua, Hana, Maui, and containing 27.64 acres, less 21.34 acres sold A. Unna, July 10, 1877, by deed recorded in liber 50, page 479, and 0.58 acres sold to Hana Iosepa, Dec. 3, 1895, by deed recorded in liber 155, page 433, leaving a residue of 5.72 acres.

IX. Parsonage, etc., at Ewa, Oahu.

Apana 1 of R. P. 1947 to Artemas Bishop conveyed by A. Bishop and wife to A. B. C. F. M. by deed dated October 19, 1869, recorded in liber 28, page 412; and also three neighboring lots conveyed to the A. B. C. F. M. by the Trustees of the Estate of Mrs. B. P. Bishop by exchange deed dated Jan. 30, 1895, recorded in liber 152, page 231.
Total Area = 3.74 Acres.

X. Parsonage, etc., at Waimea, Kauai.

No. 1 of R. P. 1938 to Mercy P. Whitney, containing 11.42 acres left by will of Mrs. M. P. Whitney to the A. B. C. F. M. for a parsonage for the Waimea church.

XI. Church Lot at Honuaula, Maui.

A portion of R. P., Grant, 835 to Mahoe, deeded by Mahoe and wife to the A. B. C. F. M. by deed dated Dec. 26, 1868, recorded in liber 26, page 486.
Area = 0.59 Acres.

172 XII. Lots in Waialee, Oahu.

A house lot and two pieces of taro land, L. C. A. 2756 to Nahuaka, in Waialee and Kaunala, conveyed to the A. B. C. F. M.

by Kaanaana by deed dated April 3, 1868, recorded in liber 25, page 258.

Total Area = 0.85 Acres.

Map No. 5.

XIII. Thurston Premises, Kailua, Hawaii.

R. P. 1930. Ap. 2, to A. Thurston, conveyed to the A. B. C. F. M. by Mrs. Thurston by deed dated Jan. 15, 1870, recorded in liber 29, page 217.

Area = 5.21 Acres.

AMERICAN BOARD OF COMMISSIONERS
FOR FOREIGN MISSIONS,
By FRANK H. WIGGIN, *Treasurer.*

Dated, Honolulu, May 7, 1909.

By the Court,

J. A. THOMPSON,
Clerk Supreme Court.

[Endorsed:] No. 5. Supreme Court, Territory of Hawaii. October Term, 1908. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, vs. The Territory of Hawaii. Findings of Fact. Filed May 7, 1909, at 2:50 o'clock P. M. J. A. Thompson, Clerk.

173 In the Supreme Court of the Territory of Hawaii.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 42, pages numbered from 53 to 94 and pages from 98 to 104, are full true and correct copies of the papers, documents, entries and judgment as the same are on file and of record in my office as Clerk of said Supreme Court of the Territory of Hawaii, and pages numbered from 43 to 46 are full true and correct copies of the appeal and assignment of errors filed January 18, 1906, as they appear on pages 27, 28, 29, and 30 in the printed record of the above entitled cause on the first appeal heretofore taken therein, and that pages numbered from 47 to 52 are full true and correct copies of the opinion of the Supreme Court of the United States rendered in the above entitled

cause as the same appears in Volume 206 on pages 218 to 224 of the United States reports, the foregoing constituting a transcript of the proceedings and judgment, and instead of the evidence at large, a statement of the facts of the case (being pages 107 to 172 of this transcript) and herewith transmitted to the Supreme Court of the United States, in a cause entitled Frederick J. Lowrey, George
174 P. Castle and William O. Smith, Trustees, Appellants, versus The Territory of Hawaii, Appellee.

I do further certify that the Original Appeal of Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, to the Supreme Court of the United States together with and annexed thereto the Original Order allowing the appeal and Acknowledgment of service of Appeal and Citation on Appeal, being pages numbered from 95 to 97 both inclusive, and the Original Citation on Appeal, being pages numbered from 105 to 106 both inclusive are hereto attached and herewith returned.

In witness whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 15th day of May, A. D. 1909, at my Office in Honolulu, in the City and County of Honolulu.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 21,695. Hawaiian Territory Supreme Court. Term No. 469. Frederick J. Lowrey, George P. Castle, and William O. Smith, trustees, appellants, vs. The Territory of Hawaii. Filed May 27th, 1909. File No. 21,695.

17

Office Supreme Court, U. S.
FILED.
NOV 29 1909
JAMES H. McKENNEY
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH, Trustees,
Appellants,
vs.
THE TERRITORY OF HAWAII,
Appellee.

No. 469.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS

DAVID L. WITHINGTON,
For the Appellants.

BOSTON:
GEO. H. ELLIS PRESS
1909

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1909.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH, Trustees, Appellants, *vs.* THE TERRITORY OF HAWAII, Appellee.	No. 469. APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS.

STATEMENT.

A former appeal from a judgment of the Supreme Court of Hawaii sustaining a demurrer to the petition was reversed by this court (*Lowrey* v. *Hawaii*, 206 U. S. 206). This appeal is from a judgment of that court upon a finding of facts substantially as set out in the statement of Mr. Justice McKenna upon the former appeal, the points of variance being:

(1) It is not found that the substituted Confession of Faith was submitted to the Prudential Committee of the A. B. C. F. M. in Boston (Tr. p. 73), an immaterial point, as the findings show that doctrines of the substituted Confession were taught, while the confession "very well represented the form of

doctrine taught at Lahainaluna," and that "the doctrines taught by the American Mission were well known and understood, and were accepted as authoritative and taught at Lahainaluna; that the system of doctrine which was taught was substantially the old orthodox Congregational or Presbyterian doctrine (Tr. p. 85); that the substitution was made by the Mission, its representative was recognized in 1865 by S. N. Castle, its Agent (Tr. pp. 81, 82, 83), in 1849 one of the committee making the substitution, and the correspondence shows that the doctrines to be taught are those of the "Congregational and Presbyterian churches of the United States." (Tr. p. 85.)

(2) It is said there is no evidence that the opinion of Attorney General Harris was in answer to a proposal to change the form of religious instruction (Tr. p. 79). Petitioners rely on historical facts, viz., the coming of the Anglican Mission at the request of Kamehameha IV and Queen Emma in 1862, the establishment of schools under the auspices of the King and Queen, the bitter contest between the missionaries and the Anglican Mission, the withdrawal of the A. B. C. F. M. from the Islands in 1863; the reported intention of Kamehameha V (who declared to the American House of Bishops that the teaching of the Episcopal doctrines was more consistent with monarchy than any other form of Christianity that he had met and that "the principles of education it inculcates seem to me, from practical evidence before me, to have the effect of making its members more religious and loyal citizens") to make Bishop Staley President of the Board of Education and intrust him with the management of the educational system, a plan which was prevented by the passage of the Act of January 10, 1865, creating a Department of Public Instruction, providing that no person in holy orders or a minister of religion shall be appointed to fill the office of the President or Inspector General of Schools. The appointment of Bishop Staley on the Board of Education, the fact that three members of the Cabinet, including Attorney General Harris, were communicants of the Anglican Church, while the fourth member was a Roman Catholic. (See "The Hawaiian Islands," Anderson: "A Brief History of the Hawaiian People," W. D. Alexander: "Five Years' Church Work, Staley: "The Making of Hawaii," Blackman). (Tr. p. 87)

(3) Finding 28 (Tr. p. 89):

"There is no evidence that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere."

This, however, must mean as a formal or written standard, for by Finding 23 (Tr. p. 85) it is found that

"Dr. Bishop testified that during his incumbency at the seminary, from 1865 to 1877, while no formal or written religious standard was used at Lahainaluna, nevertheless the doctrines taught by the American Mission were well known and understood, and were accepted as authoritative and taught at Lahainaluna; that the system of doctrine which was taught was substantially the old orthodox Congregational or Presbyterian doctrine; that the evidences of Christianity, moral philosophy, Biblical geography, church and Bible history were taught in the curriculum, and that in general there was a course of systematic religious instruction maintained. Upon being shown the substituted Confession of Faith, Dr. Bishop testified that he had never seen it until it was shown him in connection with the present case, but that it very well represented the form of doctrine taught at Lahainaluna."

(4) We quote Findings 29 and 30 in full (Tr. pp. 89, 90), as upon these findings the court below apparently decided the case:

"(29) From 1877 until the present date the course of religious instruction has been substantially the same. This includes morning prayer including occasional discussion of passages of the Scripture, compulsory attendance at Sunday-school with preparation of the International Sunday-school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which the pupils discuss biblical subjects based on the Christian Endeavor topic as given in the *Christian Endeavor World*. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. Mr. MacDonald, who has been principal since 1903, testifies that no creed had been taught during that time at the school, but that he had tried to make upright, truthful, Christian men, and held Christ up as the best example to follow; that he

had taught nothing about the Pope, or the doctrine of the Trinity, or the doctrine of Adam's Fall, or that the descendants of Adam were without holiness and alienated from God until their hearts were renewed with divine grace; that on Sunday there was a Sunday-school and occasionally, in the morning, a preaching service, in the evening a Christian Endeavor meeting; that the first year he was in Lahainaluna the boys were allowed to go to Lahaina to their own churches, but since then, with the exception of the day scholars numbering ten or twelve, they were required to stay on the grounds on Sunday and attend Sunday-school and the evening exercises; that the chapel exercises on week-day mornings lasted about ten minutes and consisted of a hymn, a portion of the Scripture and a repeating of the Lord's Prayer in unison, and occasionally incidental remarks by the principal regarding the passage of the Scripture; that there was no direct Christian instruction given in the classroom exercises during the week days other than moral instruction, as teaching the boys to do their work honestly; that the Sunday morning exercises consisted of a regular system of Bible instruction following the International Sunday-school lesson series purchased from the Hawaiian Board; that the Sunday-school lessons were assigned in advance; that in the Christian Endeavor meetings the Christian Endeavor topic in a modified form as given in the *Christian Endeavor World* was usually taken, and prayers sometimes offered by the boys and the teachers.

"(30) There is no evidence of any protest with regard to Lahainaluna or the course of study there from the American Board or from the Hawaiian Evangelical Association as bodies, but first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board."

THE FINDINGS.

In other words the court has found all the facts set forth in the petition upon which this court said, "Conviction of the justness of that conclusion is almost indisputable" (Tr. p. 31), viz.: "that the terms of the agreement require the inculcation of general learning and knowledge, accompanied with religious instruction, in accordance with the Confession of Faith submitted to the Hawaiian Government" (Tr. p. 29); has found all the circumstances and conditions which preceded the contract, surrounded it, and acts of the parties under it for thirty

years, upon which this court said that conclusion "becomes indisputable" (Tr. p. 31), but has not found that "religious instruction upon the lines formerly pursued by the Mission and subsequently by the government was continued up to or about September 1, 1903," but that it was continued till 1877, from which time till 1903 no religious instruction was given in the classroom, but there was morning prayer, Sunday-school with the International lesson, and Christian Endeavor Sunday evenings, at which nothing was taught contrary to the substituted Confession of Faith; while since 1903 neither has that creed been taught, nor the distinctive doctrines of the substituted Confession of Faith, only an effort made to hold up Christ as the best example; no classroom exercises of a religious nature, in the week-days moral instruction to the boys to do their work honestly, chapel exercises of about ten minutes, at which a portion of Scripture is read, the Lord's Prayer repeated and occasionally incidental remarks by the Principal, and on Sunday the International Sunday-school lesson in the morning, and a Christian Endeavor meeting in the evening, each of which day scholars are not required to attend.

In short, the court finds that in 1877 the teaching of religion was dropped out of the curriculum, but has not found whether or not the distinctive doctrines of the substituted Confession of Faith were taught incidentally in the morning prayer, in the Sunday-school, or at Christian Endeavor, and has distinctly found that since 1903 no instruction is given, either in the classroom or at all to the day scholars, and that the distinctive doctrines of the creed have not been taught; that the most which can be said of the teaching is that it teaches honesty, uprightness, truthfulness, and that Christ is held up as an example to these ends. (Tr. p. 90.)

THE OPINION.

The opinion of the court goes much farther than the findings, some of its statements are clearly not warranted by the findings.

ERRORS ASSIGNED.

Sixteen errors are assigned, but as they are based on the opinion which is not wholly supported by the statement of facts afterwards filed, some of these points of error vary in their statement from the statement of facts. They are reduceable to the following points and are found (Tr. pp. 60, 63):

1. Error in allowing the appellee to answer and in not ordering judgment for the appellants, the appellee having failed to ask the leave of this Court to answer, this Court having disposed of the whole case, and particularly in allowing the appellee to defend on the ground of the Statute of Limitations. (Assignments 1 and 2.)

2. Error in holding that the parties have not interpreted the agreement as claimed, in holding that morning prayer and the attendance on the part of boarding pupils upon Sunday-school and Christian Endeavor exercises on Sunday is a substantial compliance with the condition of transfer, and particularly in holding that there is religious instruction such as is contemplated by the agreement, viz., religious instruction in the definite doctrines upon the lines formerly pursued by the Mission, that the condition is to be construed as an agreement merely that religion should be taught, and that as taught it should not be contrary to the doctrines in the creed of the Mission, and that the religious instruction or tenets or doctrines contemplated in the agreement are now taught or allowed to be taught. (Assignments 3, 4, 13 and 14.)

3. Error in holding that there has been a waiver or acquiescence in the change in religious instruction, or that the action is barred by the Statute of Limitations, and subsidiary to this errors in holding that a change from Hawaiian to English involved the discontinuance of theological instruction; that if the condition means that theology should form a part of the curriculum of the school, the condition was broken as early as 1877; that the adoption of the Constitution of 1894 is conclusive that the claim was barred by the Statute of Limitations; that the Statute of Limitations is applicable to this case, the points upon acquiescence, waiver, and limitation having been concluded by the decision of this Court. (Assignments 5, 6, 7, 8, 9, 10, 11, 12.)

4. Error in holding that the plaintiffs are not entitled to maintain this action, that the conveyance from the A. B. C. F. M. to the platintiffs did not convey such right, and incidentally that the plaintiff was not entitled to judgment as prayed for. (Assignments 15, 16.)

ARGUMENT.

I.

IT IS THE LAW OF THE CASE THAT "THE TERMS OF THE AGREEMENT REQUIRE THE INCULCATION OF GENERAL LEARNING AND KNOWLEDGE, ACCOMPANIED WITH RELIGIOUS INSTRUCTION IN ACCORDANCE WITH THE CONFESSION OF FAITH SUBMITTED TO THE HAWAIIAN GOVERNMENT."

The Supreme Court of Hawaii fundamentally departed from the law of this case laid down by this Court in holding that the terms of the agreement require only "that religion should be taught, and that as taught, it should not be contrary to the doctrines mentioned."

Mr. Justice McKenna, in delivering the opinion of this Court upon the former appeal, said:

"The contentions of the parties are sharply in opposition as to the agreement and the necessity and competency of extrinsic evidence to explain it. Appellee contends that we are confined to the letter of the agreement, and so confined its conditions have been fulfilled. In other words, that 'sound literature and solid science' are still cultivated, and that no religious tenet or doctrine contrary to those heretofore inculcated by the Mission is taught. Or, to express the contention in language other than that of the agreement, that a school devoted to one subject of secular science and which excludes all religious teaching was contemplated by or is permitted by the agreement. Opposing these views, appellants contend that a mere technical school does not fulfill the agreement; that the terms of the agreement require the 'inculcation of general learning and knowledge' accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian Government." (Tr. p. 29.)

After holding that this Court cannot concur with this view, for "taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose" (Tr. p. 30), and reviewing the correspondence between the Minister of Public Instruction and the Mission, further it is said:

"Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be." (Tr. p. 31.)

Commenting upon the facts that the government recognized and continued both the school and its course of study, that the Attorney General in 1864 pointed out the true character of the transfer, the conditions and their fulfillment, that the Board of Education in 1865 "conceded the obligation to continue the institution 'so as to aid instead of defeating the purpose for which it was founded,' the alternative to be the surrender of the property or the payment of $15,000," this Court continues:

"'Religious instruction,' it is alleged, 'upon the lines formerly pursued by the Mission and subsequently by the government, in accordance with the agreement, was continued up to or about September 1, 1903.' We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning — proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward." (Tr. pp. 31, 33.)

And concludes:

"The provision for religious teaching is unchanging. It is as definite and absolute today as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000." (Tr. p. 33.)

In view of this decision, "it is somewhat staggering to be told" that all that was required is

"that religion should be taught, and as taught, it should not be contrary to the doctrines mentioned. Thus construed it is obvious that it allows considerable latitude in the amount of religious instruction." (Tr. p. 53.)

And again:

"Unless the condition prescribed the amount and extent of religious instruction it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same. This, as testified to by the graduates and by the present principal, C. A. MacDonald, comprises morning and evening prayer, including occasional discussions of passages of the Scripture, compulsory attendance at Sunday-school with preparation of the International Sunday-school lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings at which the pupils are required to discuss biblical subjects based on the Christian Endeavor topic as given in the *Christian Endeavor World*. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. In point of time occupied it compares favorably with that prescribed by the 'Laws of the High School' of 1835 as attached to the declaration and quoted in 206 U. S. 207. We regard this as a substantial compliance with the condition of transfer." (Tr. p. 53.)

We observe in passing that the findings of fact show no evening prayer, no compulsory attendance at Sunday-school or attendance at Christian Endeavor exercises except for the boarding pupils, no requirement to discuss Biblical subjects, that the occasional discussions of passages of the Scripture simply consisted of incidental remarks by the principal during the chapel exercises which lasted about ten minutes, and that no direct Christian instruction was given in the classroom other than moral instruction, as teaching boys to do their work honestly. (Tr. p. 90.)

This statement would appear to be persuasive without argument, but it may give added force to repeat it in a slightly different form, viz., the allegation in our claim is that the transfer was to be made

"in consideration of the agreement of the said Government to continue in the said school the teaching of the religious

tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the Mission, as summarized in a Confession of Faith submitted by the said Mission, not to teach or allow to be taught in the said school any religious tenet or doctrine contrary to those so inculcated by the said A. B. C. F. M. through the said Mission" (Tr. p. 6), and that "Said Government on or about the first day of September, 1903, ceased to continue the teaching of the said religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the said Mission, contrary to its agreement; and therefore the said Government must now either return the property, together with all improvements, or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement." (Tr. p. 6.)

To which the Supreme Court of Hawaii originally answered that although no one doubted that this condition would be carried out indefinitely, there was no "obligation of the Government to teach any doctrines." (Tr. p. 23.)

This conclusion was reversed by this Court, which upheld our contention that religious instruction in accordance with the Confession of Faith submitted to the Hawaiian Government is required. (Tr. p. 29.) In the application of this law of the case the Hawaiian Court has held that all that is required is "that religion should be taught, and that as taught it should not be contrary to the doctrines mentioned" (Tr. p. 53), and that instruction which carefully eliminates all Christian instruction from the curriculum and all doctrinal instruction at any time, whether in accordance with the Confession of Faith or in accordance with the religious tenets and doctrines inculcated by the Mission, is sufficient to satisfy the condition.

II.

IT IS AS MUCH A BREACH OF THE CONTRACT TO FAIL TO TEACH DOCTRINE AS TO FAIL TO TEACH RELIGION, AND THIS IS THE LAW OF THE CASE.

We have pointed out that the allegation of the petition was that the territory had ceased "to continue the teaching of the said religious tenets and doctrines theretofore inculcated by the A. B. C. F. M., through the said Mission, contrary to its

agreement." (Tr. p. 6.) The demurrer raised the question whether the failure to teach the religious tenets and doctrines of the Mission was a breach of the agreement, and not whether the failure to teach religion. This was recognized in the opinion by Mr. Justice Hartwell, who says that the plaintiff's contention is that the territory "should require those doctrines to be taught" (Tr. p. 20), and this Court sustained our contention, and held that what was required "was religious instruction upon the lines formerly pursued by the Mission, and subsequently by the government in accordance with the agreement." (Tr. p. 32.) The Court below clearly erred in holding that it was enough "that religion should be taught, and that as taught it should not be contrary to the doctrines mentioned." (Tr. p. 53.)

III.

THE CONDITION FOR RELIGIOUS TEACHING IS UNCHANGING, DEFINITE AND ABSOLUTE TODAY. NO WAIVER OR STATUTE OF LIMITATION BARS THE ACTION.

The provision is continuous and unchanging. Each breach gives a right of action.

"The provision for religious teaching is unchanging. It is as definite and absolute today as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000." (Tr. p. 33. 206 U. S. 207.)

This Court has therefore already decided this point in overruling the Hawaiian Court on the former appeal. The error of that court in the present decision is fundamentally the same as in its former decision, which admitted the intention to bind the institution to certain tenets of orthodoxy and to a certain character of instruction, but failed to find language to carry out this intention, and therefore allowed changed views in regard to religious instruction to overcome the intention of the fathers. Disavowing this conclusion of the Hawaiian Court, this Court declared that the agreement is indisputable, unchanging, definite and absolute, and yet the Hawaiian Court

now, while finding that for nearly thirty years this indisputable, unchanging, definite and absolute agreement was carried out, and the doctrines of the substituted Confession taught at Lahainaluna, holds that all that this indisputable, unchanging and definite agreement means is "that religion should be taught, and that as taught it should not be contrary to the doctrines mentioned." That this would allow "considerable latitude," and founds this on the argument that since the acts and statement of the parties in 1865 can be relied on as a contemporaneous construction, those down to the present day can be so relied on, although at variance with the contemporaneous construction; in other words, that the breach of the agreement from thirty to fifty years after it is made should override its immediate and continuous performance during the intervening thirty years in construing an instrument which the same court in its former opinion admitted the parties understood would be carried out. And in passing says:

"If it means that theology shall form part of the curriculum of the school, the condition was broken as early as 1877, and any action thereon is long since barred by the Statute of Limitations applicable to claims against the government." (Tr. p. 53.)

While it is not found that the action is barred by the Statute of Limitations, since it is not found that the condition was broken, it having apparently changed with the changing views of the denomination, it is implied that, if broken, action would have been barred under the Statute of Limitation applicable to claims against the government. (R. L. Hawaii 1905, s. 2004.)

While waiver is not suggested, we will show that no waiver could defeat the claim in this case. To do so it will be necessary for us to examine the character of a condition such as is before the court.

IV.

A TRUST OF THIS KIND FOR RELIGION IS VALID, AND SO LONG AS THERE IS ANY ONE IN INTEREST DEMANDING ITS FULFILLMENT IT MUST BE CARRIED OUT.

In discussing different classes of trusts, this Court has said of a trust of this class:

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support or spread of some specific form of religious doctrine or belief. . . . .

"In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, providing that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

"In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time hold the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine,

or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of the *Attorney General* v. *Pearson*, 3 Mer. 353, Lord Eldon said: 'I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust.' That was a case in which the trust deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the *Chancellor* arrives at the conclusion, that because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject."

Watson v. *Jones*, 13 Wall. 679.

In construing the act against importing aliens as applied to a clergyman, Mr. Justice Brewer comments on the declarations in various constitutions, citing the decisions of Pennsylvania and New York that the general doctrines of Christianity are a part of the common law of this country, and that we are a Christian people, which he says was also recognized in the Girard will case, and declares that in American life, "as expressed by its laws, its business, its customs, its society, we find everywhere a clear recognition of the same truth," and amongst specific instances which he cites is "the gigantic missionary associations for the general support and aiming to establish Christian missions in every quarter of the globe."

Church of the Holy Trinity v. *United States*, 143 U. S. 457.

When we turn to the Girard College case, we find these principles sustained by Mr. Justice Storey, who says:

"This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion

of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same; and second, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion."

. . . "The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked, why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. 'In making this restriction,' says he, 'I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are apt to produce.' Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction."

. . . . "Why may not a layman instruct in the general principles of Christianity as well as ecclesiastics. There is no restriction as to religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always be, men, not only distinguished for learning and talents, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings which such men by their conduct, as well as their instructions, may, nay, must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college — its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the

college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins, 'that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may from inclination and habit evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.' Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator had not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive."

Vidal v. *Girard's Executors*, 2 How. 127.

This case was decided in 1844, and was without doubt in the minds of the men who drew the agreement in question, who by the terms of that will were excluded from the portals of an institution which the Supreme Court of the United States held was dedicated to the teaching of the purest morality. It is incredible that these men, with this decision before them, should have contracted for an institution which merely teaches "the boys to do their work honestly," and excludes all sectarian or doctrinal teaching.

As in the Free Church case they desired to preserve the identity of doctrine and creed.

Free Church v. *Overtoun*, L. R. 1904 A. C. 515.

The prevailing doctrine may be that an independent church, such as a Congregational church, by a majority vote, may change its religious views.

Wiswell v. *First Cong. Church*, 14 Ohio St. 31.
Keyser v. *Stansifer*, 6 Ohio, 363.
Trinitarian Cong. Soc. v. *Union Cong. Soc.*, 61 N. H. 384
Fadness v. *Braunborg*, 73 Wis. 257.
Landis's Appeal, 102 Pa. 467.

But:

"When the founders or donors have clearly expressed their intention that a particular set of doctrines shall be taught, or a particular form of worship and government maintained, it is not in the power of individuals, having the management of the institution, at any time to alter the purpose for which it was founded."

Schnorr's Appeal, 67 Pa. 138.

And where it appears to have been the intention of the founder of a trust for worship, that a particular doctrine should be preached, neither the trustees nor the congregation can alter the designed objects; not even all the members.

St. Mary's Church Case, 7 Serg. & R. 517.
Den v. *Bolton*, 12 N. J. L. 206.
Craigdallie v. *Aikman*, 1 Dow, 1.
Foley v. *Wontner*, 2 Jac. & W. 245.
Leslie v. *Birnie*, 2 Russ. 114.
Davis v. *Jenkins*, 3 Ves. & B. 156.
Milligan v. *Mitchell*, 3 Myl. & C. 72; 1 Myl. & K. 446.

Thus Unitarianism and Trinitarianism, from the earliest days of Christianity, have always been deemed antagonistic systems, and the courts will interfere to prevent the use of funds given to support the teaching of one to the teaching of the other, as a perversion of the trust.

Roshi's Appeal, 69 Pa. 462; 8 Am. Rep. 275.
Rottman v. *Bartling*, 22 Neb. 375.
Attorney General v. *Hutton*, 7 Ir. Eq. 612.
Miller v. *Gable*, 2 Denio, 492, 548.
2 *Story, Eq.*, Sec. 1191, a.
Attorney General v. *Pearson*, 3 Meriv. 353; 7 Sim. 290.
Shore v. *Attorney General*, 9 Clark & F. 355.

Attorney General v. *Shore*, 11 Sim. 592.
Attorney General v. *Wilson*, 16 Sim. 210.
Attorney General v. *Drummond*, 1 Connor & L. 210; 1 Dru. & W. 353.

See also:

Christian Church v. *Carpenter*, 108 Iowa, 650; 79 N.W. 375.
Cape v. *Plymouth Congregational Church*, 117 Wis. 155; 93 N. W. 449.
Rodgers v. *Burnett*, 108 Tenn. 183; 65 S. W. 408.

"There is no doubt that a person owning property in his own right may dedicate such property by way of trust to support and propagate any definite doctrines or principles, provided it does not violate any law of morality, and sufficiently expresses in the instrument by which the dedication is made the object of the trust. In such cases it is the duty of courts, in a case properly made, to see that the property so dedicated is not devested from the trust attaching to it."

Lamb v. *Cain*, 129 Ind. 486; 29 N. E. 13; 14 L. R. A. 518.
Smith v. *Pedigo*, 145 Ind. 385; 33 N. E. 777; 19 L. R. A. 439.
S. C., 145 Ind. 406; 44 N. E. 363; 32 L. R. A. 838.

The latter case holds that historical facts within judicial notice show an irreconcilable conflict between Calvinistic and Arminian doctrines, and reviews the cases at great length.

"No principle is better settled than that property conveyed to trustees for the use of a church by its denominational name, as was the case here, creates a trust for the promulgation of the tenets and doctrines of that denomination. *Hale* v. *Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Ferraria* v. *Vasconcellos*, *Kniskern* v. *Lutheran Churches*, *First Reformed Presby. Church* v. *Bowden*, and *Miller* v. *Gable*, *supra*. History records that one of the denominations or sects known as the 'Baptists' is what is known and called 'Regular Baptists.' History says that they are strongly Calvinistic in doctrine. 1 American Church History, p. 19. A summary of their articles of faith by the same history is stated as follows: 'Articles 1 and 2 state the doctrine of the Trinity and accept the Old and New Testament as the

Word of God and only rule of faith and practice.' Article 3 declares that God chose his people in Christ Jesus before the foundation of the world, 'and predestined them unto the adoption of children;' article 4, that man is a sinner, and consequently in a lost condition; article 5, that he has no power, of his own free will, and ability to recover himself from his fallen state; article 6, that sinners are justified in the sight of God only by the righteousness of Jesus Christ; article 7, that the elect are 'called and regenerated by the Holy Spirit, through the Gospel;' article 8, 'that nothing can separate true believers from the love of God and that they shall be kept by the power of God through faith unto salvation.' *Ibid.* (1893), p. 21. This is Calvinistic doctrine, and corresponds exactly to the doctrine designated in the evidence as 'anti-means doctrine.' Tylor, Ecclesiastical Law, Sec. 830, 831. The doctrine designated in the evidence as the 'means doctrine' corresponds exactly to what is known as 'Arminian' doctrine.' *Ibid.* These two doctrines, in the light of historical facts of which courts take notice, are recognized as in irreconcilable conflict in *Miller* v. *Gable, supra.*"

Smith v. *Pedigo*, 145 Ind. 406; 44 N. E. 363; 32 L. R. A. 838, 846.

"From the early days of Christianity they have always been deemed, as they have been in our day, antagonistic systems. And courts have decided that funds given to support the teaching of one of them are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment. *Attorney General* v. *Pearson*, 3 Meriv. 353, and 7 Simons, 290; *Shore* v. *Wilson*, 9 Clark & Fin. 355; *Attorney General* v. *Shore*, 11 Simons, 592; *Attorney General* v. *Drummond*, 1 Con. & Lawson, 210, and 1 Dru. & Warren, 353; *Attorney General* v. *Hutton*, 7 Irish Eq. Rep., 612, 614; *Miller* v. *Gable*, 2 Denio, 492, 548; *Kniskern* v. *Lutheran Church of St. John's & St. Peter's*, 1 Sandf. Ch. Rep. 439; 2 Story on Eq. Sec. 1191 a."

Inhabitants of Princeton v. *Adams*, 10 Cush. 129, 132.

"It was entirely competent for the members of this society to associate together under this compact; to formulate a summary of their distinctive beliefs; to exclude therefrom all disputed questions; . . . and to surround the creed so formulated with such safeguards as they deemed proper and requisite. The creed so formulated was the basis of their association. . . . To secure it from innovation was the object of the constitutional provision. . . . The relation between the mem-

bers of this association is one of contract, and the confession of faith and constitution constitute the terms of the agreement, which is binding upon all."

Bear v. *Heasley*, 98 Mich. 279; 57 N. W. 270; 24 L. R. A. 615.

"The guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund, and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land." *Mr. Justice Sharswood, Schnorr's App.*, 67 Pa. 138.

Bear v. *Heasley, ubi supra.*

"The right to the property does not depend upon numbers, ... but, Who remained in the church, subject to its organic law?"

Bear v. *Heasley, ubi supra.*

Civil courts will adjudge the property to the members, however few in numbers they may be, who acknowledge the church connection designated in the conveyance. Mr. Justice Strong, Relations of Civil Law to Church Polity, pp. 45, 59.

Bear v. *Heasley, ubi supra.*
Baker v. *Ducker*, 79 Cal. 365; 19 L. R. A. 441.

So property dedicated to the support of a particular church becomes a trust for the support of the particular doctrine taught by that church at the time of the dedication.

Peace v. *First Christian Church*, 20 Tex. Civ. App. 85; 48 S. W. 534.

"We must look to the forms and usages of the congregation of this church prior to the controversy, to ascertain what is meant by the words in the deed to the trustees creating them trustees of the 'Greek Catholic Church of Wilkesbarre, Pa.' "

Greek Catholic Church v. *Orthodox Greek Church*, 195 Pa. 425; 46 Atl. 72.

So where a church has been endowed in connection with some ecclesiastical organization and form of church government, it cannot unite with some other organization, or become independent.

Dochkus v. *Lithuanian Ben. Soc. of St. Anthony*, 206 Pa. 25; 55 Atl. 779.

"Whenever a church or religious society has been originally endowed in connection with or subordination to some ecclesiastical organization and form of church government, it can no more unite with some other organization, or become independent, than it can renounce its faith or doctrine and adopt others."

Roshi's Appeal, 69 Pa. 462; 8 Am. Rep. 275.

The United Brethren cases are reviewed in one of the cases involving the union of the Cumberland Presbyterian organization with the General Assembly by the Court of Civil Appeals of Texas, holding that where a grantor of property for religious use indicated a purpose to establish a particular religious faith which he desired to promulgate, and makes it a condition of the grant, courts will prevent a diversion of the property.

Clark v. *Brown*, 108 S. W. 421.

The Georgia court, while assenting to this view, held that while the governing authorities of the church cannot abandon the tenets and doctrines of the original organization, yet the question as to property devoted merely to the church, without reference to specific doctrines, is usually determined conclusively by ecclasiastical tribunals, the court saying:

"There is a radical difference between an abandonment of all the teachings and doctrines of a church and a mere difference of opinion among the members of an organization as to what are the true doctrines and teachings of the organization. There may be cases where the entire abandonment will be attempted, and such intention would be clear and palpable."

Mack v. *Kime*, 129 Ga. 1; 58 S. E. 184.

The Supreme Court of Wisconsin has held that one single member can resist the diversion of property given or purchased for the maintenance of the faith of a recognized denomination to another ecclesiastical organization professing a different faith.

Marien v. *Evangelical Creed Congregation*, 132 Wis. 650; 113 N. W. 66.

V

THIS PROPERTY, WHETHER IN THE HANDS OF THE MISSION OR GOVERNMENT OR THE TRUSTEES, WAS IMPRESSED WITH A TRUST FOR A RELIGIOUS USE, AND THE FAILURE TO ENFORCE A TRUST IS NOT BARRED BY MERE LAPSE OF TIME.

The property in dispute was dedicated and originally used by the Mission of the American Board for the purpose of inculcating the doctrines in question. When it passed into the hands of the kingdom and thence to the republic and territory, it was impressed with the same trust, and the $15,000 which is sued for in this action will also be held in trust and used for the A. B. C. F. M. to carry out its corporate powers and purposes in the Hawaiian Islands, which are well known and set out in the deed of conveyance. (Tr. p. 98.)

"The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust.*"

Oliver v. *Piatt*, 3 How. 333, 411.

"To create an abandoment, there must not only be an omission to prosecute, but an intent to forego; of which there is no evidence in this case."

New York Indians v. *U. S.*, 170 U. S. 1, 35.

VI

MERE SILENCE OR DELAY WILL NOT DEFEAT THE ACTION WHERE THE OBLIGATION IS CONTINUOUS.

It has been held that mere delay in bringing a suit will not deprive a party of his remedy, unless the other party is prejudiced.

Tynan v. *Warren*, 53 N. J. Eq. 313; 31 Atl. 596.

"The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence

of the plaintiff could not operate as an estoppel upon, or preclude it from insisting upon a forfeiture, and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence. *Jackson* v. *Crysler*, 1 Johns. Cas. 125. The title to the property was vested in the grantee, and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession."

Trustees of Union College v. *New York*, 173 N. Y. 38; 65 N. E. 853; 93 Am. St. Rep. 569 and note.

Mere delay in enforcing a covenant, even for a considerable period, and after a distinct refusal to perform the contract, would not of itself operate to deprive of the remedy, if the other party has not been led to a harmful change in their position. There is no obligation to assert an equitable title until after distinct repudiation of the right.

Ryder v. *Loomis*, 161 Mass. 161; 36 N. E. 836.

Moreover, it is sometimes a sufficient answer to laches that the true construction "is a matter of serious controversy and learned argument by counsel in this case."

Stockbridge Iron Co. v. *Hudson Iron Co.*, 107 Mass. 290.

"While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked. *Carbon Coal Co.* v. *Murphy*, 101 Ind. 115, and cases cited."

Royal v. *Aultman-Taylor Co.*, 116 Ind. 424; 19 N. E. 202.

The wrong-doer cannot allege his own wrong for the purpose of carrying back the injury to a time which would let in the statute.

Angell on Limitations, 5th ed., Sec. 72.

"A *tort feasor* cannot allege his own wrong for the purpose of defeating an action upon the contract."

Ganley v. *Troy City National Bank*, 98 N. Y. 487.

Apparently past breaches can be waived by considering the condition still in effect, with knowledge of the breaches.

Hubbard v. *Hubbard*, 97 Mass. 188.
Payson v. *Burnham*, 141 Mass. 547; 6 N. E. 708.
Linzee v. *Mixer*, 101 Mass. 512.
Bacon v. *Sandberg*, 179 Mass. 396.

Indeed, neglect and remissness may not constitute a breach of a condition. There must be an intention not to carry out the contract, and this was held by the Supreme Court of Maine in a case where property had been conveyed under a condition to carry on services, which were not held from 1859 to 1866.

Osgood v. *Abbott*, 58 Maine, 73.
Mills v. *Evansville Seminary*, 58 Wis. 135; 15 N. W. 133.

Under an agreement to support a wife, without expense to the husband, and to save him harmless, the court said:

"We do not think the right to enforce an obligation for a life support is barred by the mere neglect for any length of time to take the benefit of the provision."

Coleman v. *Whitney*, 62 Vt. 123; 20 Atl. 322; 9 L. R. A. 517.

All that is found in this case is mere silence or delay, and that is not sufficient to create an estoppel which would prevent an assertion of a right of forfeiture. If it will not prevent the assertion of the right of forfeiture, then certainly it will not prevent the assertion of the right to money payable to prevent the forfeiture.

Gray v. *Blanchard*, 8 Pick. 284.
Maginnis v. *Knickerbocker Ice Co.*, 112 Wis. 385; 88 N. W. 300; 69 L. R. A. 833.
Jackson v. *Crysler*, 1 John. Cas. 125.

Mere parol assent, without change of the situation of the parties, does not destroy an express condition.

Jackson v. *Crysler*, *ubi supra.*

See also
Plumb v. *Tubbs*, 41 N. Y. 442.

Treating the condition in a deed as still subsisting, after a breach, is a waiver of the breach.

Hubbard v. *Hubbard*, 97 Mass. 188.

It has been repeatedly held that where there was a right of election to declare a note forfeited for default in the payment of interest, the Statute of Limitations did not begin to run from such default unless the promisee elected to avail himself of the right; the ground being that a party is estopped to allege a forfeiture caused by his own default. He cannot take advantage of his own wrong.

So it has been held where a deed had been made to the Congregational Church Building Society providing that a Society should continue to be an Evangelical Congregational Church, maintain public worship, make an annual contribution, preserve its corporate existence, not alienate its house of worship, pay all taxes and liens, and keep the house insured, that the condition was not an ordinary mortgage, but to secure the application of the money for the purposes to which it was donated, and to compel the continuous use of the property; and although it was found that no contribution had been made for more than seven years, taxes had not been paid nor the building insured, and that the plaintiff knew of these failures more than six years before the action was brought, it was held that these breaches would not set the Statute of Limitations in motion and that the plaintiff had a right to waive the forfeiture and to allow the Turlock Society to continue to perform such of the covenants as it was able to perform, without setting in motion the Statute of Limitations; that this waiver, however, was not a waiver of the right to forfeit for a subsequent failure within the time of the period of limitations.

Congregational Church Bldg. Society v. *Osborn*, 94 Pac. 881.

Standing by and seeing a city violate a condition on which a park was dedicated by erecting a pumping station, and even giving a deed to the city in which reference is made to the right of the city to use the pumping station, where it has not shown that it is understood that conditions had been waived and a reliance on the waiver shown, does not prevent the enforcement

of a condition for forfeiture from the use of the land for the pumping station.

Howe v. *City of Lowell*, 171 Mass. 575; 51 N. E. 536.

Bringing an action for the annual payments to be made for support, for prior breaches, is not a waiver of a right to rescind for subsequent breaches. "Patient endurance of the defendant Gall's wrongs by repeated breaches certainly cannot operate to bar her right to rescind when such conduct on his part becomes unendurable."

Gall v. *Gall*, 126 Wis. 390; 105 N. W. 953; 5 L. R. A. (N. S.) 603.

The rule in Dumpor's case (4 Coke, 119; 1 Smith Leading Cases, 47) that a condition once waived is gone forever is restricted to negative or prohibitory conditions in *Doe* v. *Bliss* (4 Taunt. 735). Sir James Mansfield says: "Certainly the profession have always wondered at Dumpor's case, but it has been law so many centuries that we cannot now reverse it."

The receipt of rent after the breach of the covenant does not prevent a re-entry for a subsequent breach.

Bleecker v. *Smith*, 13 Wend. 530.

In *Doe* v. *Bliss*, Mr. Justice Gibbs said that the waiver of the forfeiture, where it was one of a continuing series of acts, was "a mere tolerance." All that can be inferred is that the lessor is willing to condone or tolerate the past, and not that he is prepared to sanction a continuance of the default or allow the condition to remain forever unfulfilled. Where an orchard remained unplanted after the acceptance of rent, this did not exonerate the tenant from a subsequent or continuing failure to perform.

Doe v. *Woodbridge*, 9 B. & C. 376.

See also

Dakin v. *Williams*, 17 Wend. 447.
Doe v. *Jones*, 5 Exch. 498.
Farwell v. *Easton*, 63 Mo. 446.
Alexander v. *Hodges*, 41 Mich. 691.
Adams v. *Ore Knob Copper Co.*, 7 Fed. 634.
Maginnis v. *Knickerbocker Ice Co.*, 112 Wis. 385; 88 Wis. 300; 69 L. R. A. 833.

VII.

DEMAND OR AN EQUIVALENT ACT NECESSARY TO SET STATUTE IN MOTION.

Entry for condition broken, or some other equivalent proceeding, as demand and refusal, is necessary to make good the forfeiture.

Preston v. *Bosworth*, 153 Ind. 458; 74 Am. St. 313.

So it has been held that damages in the holding of an estate forfeited for breach of a condition subsequent can only be recovered from the date of demand.

Little Falls Water Power Co. of Minnesota v. *Belin*, 69 Minn. 253; 72 N. W. 69.

A breach of condition does not *ipso facto* revest the estate. The title only becomes voidable at the election of the grantor or his heirs, or some other person authorized to make the election. Not until the grantor or his proper substitute has taken advantage of the condition does the estate become divested.

Lewis v. *Lewis*, 74 Conn. 630; 51 Atl. 854; 92 Am. St. 240.

It would seem that where a grant is upon a condition subsequent, and there is no expressed disavowal of the condition, a demand for the performance of the full condition would be required.

Hadley v. *Hadley Mfg. Co.*, 4 Gray, 140.

See also

Crane v. *Hyde Park*, 135 Mass. 147.
Merrifield v. *Cobleigh*, 4 Cush. 178.

Nothing less than a demand for a reconveyance would stop the Statute of Limitations.

"Where land was conveyed on condition that the grantee should, in case of the grantor's death, support the latter's daughter, and that if the grantor should recover her health, the property should be reconveyed, the statute of limitations

did not begin to run against a cause of action in favor of the grantor for a reconveyance until the grantee had been requested to reconvey and refused, or rendered powerless to reconvey by conveying the land to another."

Appeal of Ward, 35 Conn. 161.

"The statute of limitations does not begin to run against a suit by the obligee for the specific performance of a title bond, until a demand and refusal to make title, or some act by the obligor indicating an intention to claim the land or repudiate the sale."

Yeary v. *Cummins*, 28 Tex. 91.

The Statute of Limitations does not commence to run against a claim for money given to a person who receives it on an agreement to do certain things, which he does not do, until there is a demand and refusal to perform the contract,

Link v. *Jarvis* (Cal.), 33 Pac. 206.

then the election passes to him.

Norris v. *Harris*, 15 Cal. 226.

The Statute of Limitations does not run where no time is fixed, unless the plaintiff has demanded performance and been refused.

Eames v. *Savage*, 14 Mass. 425.

So it has been held that the Statute of Limitations does not commence to run because of the inaction of an officer of the United States, although his action could have been demanded.

United States v. *Louisiana*, 123 U. S. 32.

"It is also a well-established rule that, when maintenance or use is a part of the condition, there must be such neglect to maintain as to indicate an intention not to comply, to constitute a breach of condition. *Osgood* v. *Abbott*, 58 Me. 73; *Mills* v. *Evansville Seminary* (Wis.), 15 N. W. 133; *Rowe* v. *City of Minneapolis*, 49 Minn. 148, 51 N. W. 907; *Hurto* v. *Grant*, 57 N. W. 899, 90 Iowa, 414. In other words, it must be shown that the spirit and purpose of the condition have been willfully disregarded by the grantee, to establish such breach as will authorize a re-entry by the grantor. Jones, Real Prop. Sec.

680, and cases cited. Again, it is held in *Gardner* v. *Lightfoot*, 71 Iowa, 577, 32 N. W. 510, that an executed conveyance will not be set aside for failure to perform a condition subsequent, where there has been a partial performance, accepted as such, and the parties cannot be placed *in statu quo*. Applying any of these rules to the fact above cited, and it is clear that there has been no such breach of condition as authorized the defendant to enter and claim for forfeiture. Moreover, while it is a general rule that no demand for performance is necessary, yet where, as in this case, there is an evident waiver of performance by defendant's immediate grantor, it seems to us that demand is necessary, before the right of re-entry exists. See *Merrifield* v. *Cobleigh*, 4 Cush. 178; *Bradstreet* v. *Clark*, 21 *Pick.* 389; *Donnelly* v. *Eastes* (Wis.), 69 N. W. 157; *Cory* v. *Cory*, 86 Ind. 567; *Royal* v. *Aultman & Taylor Co.*, 116 Ind. 424, 19 N. E. 202; *Hurto* v. *Grant, supra.*"

Bonniwell v. *Madison*, 107 Ia. 85; 77 N. W. 530.

So where a sheriff had the proceeds of the sale of property of a bankrupt two years, the Statute of Limitations does not begin to run until a repudiation of the right to claim; that is, until after a demand and refusal, and even eleven years does not bar an action.

French v. *Merrill*, 132 Mass. 525.

So where land has been conveyed pursuant to an oral agreement, which cannot be enforced because of the statute of frauds, and recovery of the property is allowed because of the failure of the consideration of the conveyance, the Statute of Limitations does not begin to run until there is a demand for reconveyance and a refusal.

Cromwell v. *Norton*, 193 Mass. 291; 79 N. E. 433.

Where the provision is that the estate shall be void if the grantee shall neglect or refuse to support a fence, there will be no breach of condition until there is a demand, notice or request to comply with the requirements.

Merrifield v. *Cobleigh*, 4 Cush. 178.

So the Statute of Limitations does not run upon an agreement to convey until after a demand. Thus it was held that a delay of ten years was not a bar.

Stretch v. *Schenck*, 23 Ind. 77.

"Until, therefore, a demand has been made, or there has been such repudiation as excuses a demand, the statute of limitations does not beign to run."

Parks v. *Satterthwaite*, 132 Ind. 411; 32 N. E. 82.
Horner v. *Clark*, 27 Ind. App. 6; 60 N. E. 732.

Where bonds were sold, with agreement to take them back at any time, a demand made and withdrawn in 1890, a new demand made in 1895, it was held that the cause of action did not accrue until the demand in 1895.

Lydig v. *Braman*, 177 Mass. 212; 58 N. E. 696.

Where a deed was made for security for what the grantor owed the grantee, there was no adverse possession, either to the land by twenty years' possession, or to the proceeds of the land, where it had been sold more than six years before the filing of the bill; but a grantee of the mortgagor can maintain an action to account after a demand and admission of the liability, but afterwards the claim of the Statute of Limitations.

Babcock v. *Wyman*, 19 How. 289.

On a contract made in 1871 to support another should the grantor lose his money and call on the defendant for help, the defendant to support him as long as support was needed, or until he had paid $500, it was held that the Statute of Limitations did not begin to run until a demand.

Stringer v. *Stringer*, 93 Ga. 320; 20 S. E. 242.

Where stock is loaned, to be returned on demand, there is no default until demand is made; nor does the Statute of Limitations run till then.

Parker v. *Gaines*, 11 S. W. (Ark.) 693.

Even where there is a statute providing that where the plaintiff has the right to demand, the Statute of Limitations commences to run from the time that he has the right, and not from the date of the demand. Where money is left with a gratuitous bailee, the statute does not begin to run until demand has been made.

Goodwin v. *Ray*, 108 Tenn. 614; 69 S. W. 730.

In the latter case it is said that the relation of debtor and creditor does not exist before the demand is made.

Upon a contract to account or return on demand, no action can be maintained until demand.

Bolles v. *Stearns*, 11 Cush. 320.

Where a deed was to be executed upon payment of the sum expended, with interest, while the party might have treated the agreement as abandoned after the lapse of a reasonable time for payment, the Statute of Limitations would not run before a demand for a deed.

Owen v. *Higgins*, 113 Ia. 735; 84 N. W. 713.

Where an act of Congress declares that lands granted to aid the construction of a railroad shall revert to the United States, upon failure to construct the road, as agreed, it was held that they "do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action equivalent to a judgment of office found at common law."

St. Louis R. R. Co. v. *McGee*, 115 U. S. 469.
Bybee v. *Oregon & California R. R. Co.*, 139 U. S. 663.

In the latter case it was held that it was only the grantor or those in privity with him who could take advantage of the forfeiture.

Plaintiff consigned goods to a firm to be sold and disposed of. About fourteen years after, plaintiff demanded an account sales, and brought his action. Held, no action lay until demand made.

Topham v. *Braddick*, 1 Taunt. 572.
Wright v. *Hamilton*, 2 Bailey Law, 51; 21 Am. Dec. 513.

Defendant agreed to deed certain lands if they were not redeemed, or to pay the money received for the redemption, or, on failure, to pay all damages. Held, the Statute of Limitations did not run until demand.

Collard's Administrator v. *Tuttle*, 4 Vt. 491; 24 Am. Dec. 627.

The agreement being in the alternative, until a refusal to reconvey, the right to the money demand would not arise.

This arises since the choice is primarily in the promissor.

"A promise in the alternative puts the alternative in the election of the promissor, unless there is something to take it out of the general rule." Redfield, C. J., in

Mayer v. *Dwinell*, 29 Vt. 298.
Foster v. *Goldschmidt*, 21 Fed. 70.
Dessert v. *Scott*, 58 Wis. 390; 17 N. W. 14.

"*Per Curiam.* This appears to have been an alternative obligation, and the defendant had his election to pay at the rate of eight dollars an acre by certain times, or to pay nine dollars an acre by another specified time, and which last time had not arrived when the suit was commenced. The right of electing the alternative belonged to the defendant. This appears by the case of *McNitt* v. *Clarke*, 7 Johns. 465, and the authorities there referred to. The right of election by the debtor, in all alternative obligations, was also a principle in the civil law, and the passages in support of it are collected by Pothier. *Traite des Obligations.*"

Smith v. *Sanborn*, 11 Johns. 59.

The case of *McNitt* v. *Clarke*, 7 Johns. 465, cited, would indicate that before the day of payment the obligor had the election, and after the day of payment the obligee could elect.

To the same effect,

Patchin v. *Swift*, 21 Vt. 292.
Ross v. *Sutton*, 1 Bailey's Law, 126; 19 Am. Dec. 660.

See also

Barker v. *Jones*, 8 N. H. 413.
White v. *Toncray*, 5 Grat. 179.

But upon a refusal, the election passes to the obligee.

Ramsey v. *Waltham*, 1 Mo. 395.

"In contracts, when a debtor is obliged, in an alternative obligation, to do one of two things, he has the choice to do one or the other until the time of payment, or until demand where no time of performance has been agreed on; and, on the failure of the person who has the right to make his election in proper

time, the right of election passes to the opposite party. Co. Litt. 145a; *Corbin* v. *Fairbanks*, 56 Vt. 538; 1 Bouv. Law Dict. (Rawle's Rev.), 646, 647."

Phillips v. *Cornelius* (Miss.), 28 So. 871.

See also

McMillan v. *Philadelphia Co.*, 159 Pa. 142; 28 Atl. 220.

Where the right of election is in the promisee, he is bound to notify the promisor of his choice before he is entitled to any right of action.

Center v. *Center*, 38 N. H. 318.

In a case where the plaintiffs transferred to the defendants certain railroad bonds, with a guarantee to refund what was paid, on certain contingencies, which failed, the bonds having risen, the plaintiffs brought an action for the bonds. It was held that they had no right of action.

"The plaintiffs could undoubtedly, after the default, put the defendants to their election, either to keep the bonds, or take the money and deliver the bonds, by tendering the money and demanding the bonds."

Litchfield v. *Irvin*, 51 N. Y. 51.

The case cited by the Hawaiian court on the Statute of Limitations is consistent with our contention that of a patent used by the government, the claim being for its use. In that case the court said:

"A claim first accrues at the time when the debt becomes due and payable. That is to say, at the moment *when an action can first be brought to recover it.*"

Hartman v. *United States*, 35 Ct. Cl. 106.

All that this case decides is that the Statute of Limitations begins to run upon a debt when it becomes due and payable, that is to say, when an action can first be brought to recover it. In this case, until the refusal to exercise its option to reconvey the property, or at least to distinctly repudiate any obligation, no action would lie.

VIII.

THE STATUTE OF LIMITATIONS WAS FULLY DISPOSED OF ON THE FORMER APPEAL.

One of the points argued upon the former appeal was that the action was barred by the Statute of Limitations. The demurrer raised the point (*b*) "that it appears by said petition that petitioners' right of action, if any, accrued more than two years prior to the commencement of this action." (Tr. p. 18.) On this ground we were sustained by the Hawaiian Court. (Tr. p. 24.) This Court said upon this point, "It is no defence that the government's policy is changed; it cannot so release itself from its engagements." (Tr. p. 33.) The contention of the territory in this Court was that since the constitution of Hawaii of 1894 prohibited the appropriation of public money for the support or benefit of any sectarian, denominational or private school, which provision was continued by section 55 of the Organic Act (Tr. p. 5), that, therefore, the action was barred by the Statute of Limitations. It is immaterial whether the repudiation, if such there has been, was in 1877 or in 1894, as in either event it was two years before the bringing of this action, and the declaration of the constitution of 1894 is as much a repudiation of the obligation as the failure to perform.

IX.

THERE IS NO DISTINCT FINDING THAT THERE WAS A FAILURE TO GIVE ANY SECTARIAN INSTRUCTION PRIOR TO 1903.

It is true that the court has found that the course of religious instruction since 1877 has been substantially the same (Tr. p. 89), but it appears from the opinion that in fact neither party introduced any direct evidence concerning the religious instruction in the doctrines enumerated during these years. (Tr. p. 44.) In other words, the plaintiff showed complete compliance up to 1877, and a complete breach after 1903. Neither the plaintiff nor the government introduced any direct evidence whether these doctrines were taught in the meantime. It is said by the court "that the change from Hawaiian to

English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious." (Tr. p. 53.) How it is obvious is not made clear. What Dr. Bishop meant to say was, that it would be more difficult to give the instruction to Hawaiians, using the works ordinarily used in giving instruction in American seminaries. We are concluded from attacking the finding, the evidence not being before the court. We may indulge in the surmise that in the transition in the attitude of the Congregational and Presbyterian churches towards creeds and doctrines, instruction gradually vanished from the school, until it has disappeared without having attracted the notice even of the American Board, until it was brought to their attention as appears in the record by the letter of the Governor of the Territory, March first, 1904. (Tr. p. 96). It might be appropriate to add that his letter, the opinion of the Attorney General in 1903 (Tr. pp. 92-96 inclusive), and the conduct of the parties indicate the recognition of the condition with a difference of opinion as to its terms.

This is not such a repudiation as would set the Statute of Limitations in motion. It may be further observed that the institution is situated on another island than that upon which Honolulu is situated, remote from the ordinary line of travel.

X.

THE PLAINTIFFS ARE ENTITLED TO MAINTAIN THIS ACTION.

(a) *This is the law of the case, the point being open upon the former appeal.*

Bearing in mind that the property was held in trust for a particular purpose, that the Mission and American Board were but trustees of a charitable trust held for religious purposes, that the property was conveyed to the government to carry on the same purpose, and that the money which would be recovered in this action would still be appropriated to the original purpose to subserve which the Mission was founded, we submit that there is no point open on the deed itself which was not open upon the petition. The petition alleged:

"That all the rights, property and interest of the American Board of Commissioners for Foreign Missions to any property in the Territory of Hawaii and any claim or demand whatsoever with reference thereto was by deed, duly executed and delivered, conveyed to Henry Waterhouse, since deceased, and your petitioners, Frederick J. Lowrey and William O. Smith, by deed of trust, dated July 25, 1903, and recorded in the office of the Registrar of Conveyances in Honolulu, Island of Oahu, Territory of Hawaii, in Liber 254, pages 91 to 101." (Tr. pp. 5, 6.)

And further:

"That the right to recover, hold and manage any of the said properties or interests or rights, or any rights or interests arising therefrom or with reference thereto, so conveyed by the said trust deed, are now vested in your petitioners." (Tr. p. 6.)

The deed conveys

"all and singular the lands and real estate situate in said Territory of Hawaii belonging to said Grantor, . . . together with all other lands in the possession of or belonging to said Grantor or in or to which said Grantor has any right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise. . . . Together with all and singular the tenements, hereditaments, rights, privileges, and easements thereunto belonging or in any wise appertaining, and the improvements thereon." (Tr. p. 99.)

And the purposes of the trust are declared at great length, finally concluding:

"generally, to do and perform every act and thing and exercise every power and authority whatsoever, not herein specifically denied or withheld from or herein directed to be otherwise done or exercised by said Trustees, as fully and to every intent and purpose as though the said Trustees were the absolute owners in fee in their own personal right of the property hereby conveyed."

The trustees are to receive all issues and proceeds of sale, realization and income, with a general power of sale. The point as we understand, which is made is, that the deed did not convey specifically the right to recover the $15,000. The answer to this is that there was no right to recover $15,000. It was

a right to recover the land, or in case the Territory saw fit, to receive $15,000 in lieu of the land. The deed clearly conveyed the land, with the right to sell the land. The Territory recognized this in dealing with the trustees, and the deed is as broad and no broader than the allegations of the complaint. Technically under the common law, no one but the grantor could sue for a breach of a condition subsequent, to recover the property, and in case he had conveyed the property no one could sue, but this Court has held already that the plaintiffs herein had a right to maintain this action. That could only be on the ground that they acquired it by virtue of a deed which was executed on the 25th day of July, 1903, whereas the breach is alleged to have taken place on the first day of September, 1903, or in other words, at a time when there was no right to the money, and no right to the land, excepting by reason of the condition subsequent.

Another reason is that this is an action against the government for a breach of a trust, which should be brought by the real party in interest, and the trust deed shows the intent to convey to the trustees all the property of the American Board within the Territory of Hawaii, which was subject to the trust in favor of the Hawaiian Mission. In a claim against the government arising out of the trust the trustees were clearly the proper parties; the claim resided in them, and no question was ever made of this until at the second hearing of the case, when for the first time the point was made. We submit the point is not well taken, and if well founded, is taken too late.

(b) *The Hawaiian Court has since apparently so held.*

Again, the court which has held in this case that the right did not pass, has apparently held otherwise in a subsequent case of a warranty deed of a particular tract of land, the title to which was in a trustee, with the power to sell, but in the income, from which the grantor had an equitable life interest the Hawaiian court has said:

"In our opinion the deed in question operates in equity as an assignment to the plaintiff of the interests at least of Joshua, Josephine and Georgiana in the income. No particular form of words is necessary to make an equitable assignment. The in-

tent of the parties is what is to be sought for and enforced. Even assuming that the parties in this instance in giving and receiving the deed believed that the grantors had interests in the land itself as distinguished from its income, it seems clear to us that the intention was that the grantors transfer to the grantee all of their interest not only in the land itself but also in all that it should thereafter produce, whether by way of rent, interest or otherwise. It would be doing violence to their intent to now hold that all or any part of the interest of the grantors in the income has not passed to the grantee, but is still in the grantors and collectible by them."

McCandless v. *Castle*, 19 Haw. 515, 518.

In another case, in which it was shown that land was practically valueless without a water-right, it was held that even if the words of the deed

"did not convey this right, it passed impliedly on the principle that where the owner of an entire tract sells a portion the grantee takes that portion with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the property which the vendor retains. This is a rule which is reciprocal and is a just and reasonable one. As was said in *Lampman* v. *Milks*, 21 N. Y. 507, 'The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right by altering arrangements then openly existing to change materially the relative value of the respective parts.' See also *Cave* v. *Crafts*, 53 Cal. 135; *Seymour* v. *Lewis*, 13 N. J. Eq. 439; *Kelly* v. *Dunning*, 43 N. J. Eq. 62; *Toothe* v. *Bryce*, 50 N. J. Eq. 589."

Oahu R. & L. Co. v. *Armstrong*, 18 Haw. 258, 261.

XI.

THE COURT BELOW COULD NOT AUTHORIZE A NEW DEFENCE.

The court erred in allowing an answer to be filed, and erred after they had refused to allow an amendment to the answer setting up the Statute of Limitations, in holding that the statute would be a defence. The entire case was argued before

this Court upon demurrer. As a matter of fact the claim was prepared in order that it might present the facts as the parties understood them, and that a judicial determination might be had without unnecessary trouble. If the Territory desired to answer, however, it should have applied for leave to this Court and not to the Hawaiian Court.

Murphy v. *Utter*, 186 U. S. 95.

Respectfully submitted,

DAVID L. WITHINGTON,

For the Appellants.

APPENDIX

CHAPTER 129, REVISED LAWS OF HAWAII, 1905.

Sec. 2000. *Jurisdiction, Supreme Court.* The Supreme court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury.

First. All claims against the Territory founded upon any statute of the Territory; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the Territory, and all claims which may be referred to it by either house of the legislature; *Provided,* however that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any Territorial officer which such officer is not authorized to make or do by the laws of this Territory, nor upon any other cause of action than as herein set forth.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Territory against any person making claim against the Territory under the provisions of this Chapter (L. 1894–5, c. 26, s. 1; C. L. s. 1530).

Sec. 2004. *Limitations on suit.* Every claim against this Territory, cognizable as aforesaid, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within two years after the claim first accrues; *Provided,* that the claims of persons under legal disability shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within one year after the disability has ceased. (L. 1894–5, c. 26, s. 5; C. L. s. 1534.)

Sec. 2005. *Petition.* The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in the legislature, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such person became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from this Territory, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all

times borne true allegiance to this government, and whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against this government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney. (L. 1894–5, c. 26, s. 6; C. L. s. 1535.)

Sec. 2008. *Judgment is final.* The judgments of the Supreme court in all matters brought before it under the provisions of this chapter shall be final.

ACT OF JULY 11, 1850, INCORPORATED IN CIVIL CODE.

Civil Code 1859, page 174.

Section 738. Whereas, an arrangement has been made between the Hawaiian Government and the American Board of Commissioners for Foreign Missions, whereby the seminary at Lahainaluna has been ceded to the King's Government, on condition that the Government undertakes its support; and whereas, it is desirable to have some institution, where Hawaiian youth can be properly educated for various occupations, therefore, the arrangement, whereby the seminary of Lahainaluna has been surrendered to the King's Government, is hereby ratified and confirmed, and a reasonable sum shall be appropriated annually out of the public funds, for the support of said seminary, in pursuance of said arrangement.

Section 739. Said seminary shall be under the care and direction of the Board of Education, who shall appoint its teachers, and make rules and regulations, from time to time, for its government, and course of instruction; provided, that such rules and regulations do not conflict with the conditions on which that institution was ceded to the Government, nor with any law of this kingdom. Said Board shall have the care and management of the buildings, premises, apparatus, and all other property belonging to said institution.

Section 740. It shall be the duty of the President of the Board of Education, to include in his report to the Legislature, at each regular session thereof, a statement of the operations and condition of said seminary.

Sections 1, 2, 3 respectively, in Act, July 11, 1850.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 469.

FREDERICK J. LOWREY, GEORGE P. CASTLE, AND WILLIAM O. SMITH, TRUSTEES, APPELLANTS,

vs.

THE TERRITORY OF HAWAII, APPELLEE.

BRIEF FOR APPELLEE.

C. R. HEMENWAY,
Attorney General of Hawaii, for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from the Supreme Court of the Territory of Hawaii to review a judgment for defendant rendered upon a petition brought to recover from the Territory of Hawaii the sum of $15,000.00 for an alleged breach of certain conditions in an agreement made between the American Board of Commissioners of Foreign Missions and the Hawaiian Government in the year 1849 respecting the nature and kind of instruction to be given at Lahainaluna Seminary.

Suit was brought by appellants in December, 1905, their petition alleging in substance that in the year 1849, by agreement evidenced by certain correspondence, the A. B. C.

F. M. transferred to the Hawaiian Government the seminary at Lahamaluna upon the understanding that it should be maintained by the Government along the same lines as it had been maintained by the mission, and more particularly that no religious instruction contrary to the tenets of a certain creed or confession of faith, a copy of which was attached to the petition, should be given, and that sound literature and solid science should be taught. A breach of these conditions, it was agreed, would give to the A. B. C. F. M. the right either to a conveyance of the school properties or, at the option of the Hawaiian Government, to the payment of $15,000.00. Plaintiffs allege that a breach has occurred both in regard to the giving of religious instruction and in regard to the teaching of sound literature and solid science; that demand has been made upon the Government for a conveyance or the payment of the specified $15,000.00, which demand was refused, and that therefore the sum of $15,000.00 is due them. A more detailed statement of the facts alleged in the petition is contained in the report of this case upon the former appeal (Lowrey *v.* Hawaii, 206 U. S., 206).

The Territory first demurred to the petition upon various grounds, which demurrer was sustained by the Supreme Court of Hawaii in January, 1906 (Tr., pp. 19-26). Judgment was accordingly rendered for defendant, and from this judgment an appeal was taken to this court (Tr., pp. 27-29). The cause having come on for hearing, a decision was rendered in May, 1907, reversing the judgment of the Supreme Court of Hawaii and remanding the case with directions "to proceed in conformity with the opinion" (Lowrey *v.* Hawaii, 206 U. S., 206—Tr., pp. 29-33). Thereafter, in September, 1907, the Territory filed its answer, denying generally the allegations in the complaint (Tr., p. 33). On February 17, 1908, the cause having been set for trial in the Supreme Court of Hawaii, plaintiffs moved for judgment on the pleadings upon the theory that the decision of this court upon the

first appeal was decisive of the case. The motion was denied (Tr., pp. 34, 35, 36). Thereafter the Supreme Court of Hawaii proceeded with the trial of the cause, such trial lasting from February 17 to 21, 1908, inclusive. On July 1, 1908, the Territorial Supreme Court rendered its opinion, directing judgment for defendant (Tr., pp. 36 to 57). A formal written judgment for defendant was entered of record on September 8, 1908 (Tr., pp. 57, 58).

From this judgment plaintiffs now appeal, assigning various errors in the record, which are, however, summarized in the two principal errors claimed to exist, to wit:

First. That error was committed by the Supreme Court of Hawaii in rendering judgment for defendant upon the merits.

Second. That error was committed by the Supreme Court of Hawaii in permitting defendant to answer and in refusing to give judgment for plaintiffs upon the record.

These two general propositions will be considered in this order and it will be submitted that there was no error in the judgment rendered.

I.

It was not error for the Supreme Court of Hawaii to give judgment for defendant.

The real question involved in this case—the question which arises upon the merits—is the correctness of the conclusion reached by the Supreme Court of Hawaii that judgment should be given for defendant. All of the assignments of error numbered from 3 to 16, inclusive, are summed up in the final assignment that it was error to render judgment for defendant, the other assignments stating with some particularity plaintiffs' reasons for this conclusion. The Territory now submits that this judgment was correct for the reasons presented below.

(*a*) The evidence shows a substantial compliance with the conditions of the agreement interpreted, as directed by thi-

court, in the light of the circumstances which preceded it and the long and continued practice under it.

The complaint alleges that the agreement made has been broken by the Territory in two particulars. In the first place, because religious instruction along the lines formerly pursued by the mission, and continued by the Government up to about September 1, 1903, was abandoned on or about that date; and in the second place, because the cultivation of sound literature and solid science also ceased on or about July 1, 1904 (Tr., pp. 5, 7).

The conclusion of the Supreme Court of Hawaii, the trial court in this instance, with regard to the first alleged breach was that the evidence showed a substantial compliance with this condition of the agreement, and with regard to the second alleged breach was that as much, if not more, sound literature and solid science is being taught today as was ever taught during the days when the school was maintained by the mission, and that there was no cessation of such teaching on the date alleged.

It is to be noted that plaintiffs offered no evidence and in fact did not attempt to offer any evidence to sustain the allegation that religious instruction along the lines, formerly pursued by the mission was continued up to September 1, 1903, or that it ceased to be a part of the curriculum on or about that date (Tr., p. 44). Instead of doing so, plaintiffs attempted to shift the burden of proof upon defendant by offering the testimony of the principal at Lahainaluna from 1865 to 1877, and then the testimony of the present principal as to the instruction since September 1, 1903, leaving the intervening years uncovered by any evidence (Tr., p. 44). No question, however, as to a technical shifting of the burden of proof exists, because the Territory offered evidence covering all of the intervening years referred to above and showing the course of instruction during those years. Evidence was also offered in documentary form giving a comprehensive view of the course of instruction from the time of the

foundation of the institution to the present date. The Supreme Court of Hawaii founded its conclusion upon a consideration of all such evidence, a summary of which appears both in the opinion of the Supreme Court of Hawaii (Tr., pp. 44 to 53, inclusive) and also in the findings of fact made by such court (Tr., pp. 74 to 90, inclusive).

It is not necessary nor desirable to quote in extenso from the documentary evidence thus made a part of the record. Certain general considerations drawn from it will be noted in order to show that the conclusion of the Territorial Court is fully sustained.

Much emphasis upon the hearing of this case before this court on the former appeal and much emphasis during the trial of the facts before the Supreme Court of Hawaii was laid by plaintiffs upon the matter of religious instruction and every effort was made to show that the primary purpose of the school at the time it was founded was to train young men for the ministry, that is, that the school was founded and carried on in its early days chiefly as a theological seminary. No evidence whatever to justify any such contention exists in this record and the Supreme Court of Hawaii was obliged to remark (Tr., pp. 44, 45),

> "One of the avowed objects of the early founders of the seminary was the education of young men to become ministers, yet there is no evidence from which we can find that at any period the institution was a theological seminary in the sense that it prepared its graduates for immediate service in the ministry."

Doubtless there was present in the minds of the founders of the school the hope that ultimately this school would grow into a theological training school. But they were practical men and did not attempt the maintenance of such a school without first laying the essential foundation of a thorough preliminary training. The laws of the high school of 1835, extracts from which are attached to the complaint (Tr., p. 8), and the full text of which appears in the findings of fact

(Tr., pp. 74, 75), show that one of the principal objects of the school at its founding was to train teachers who would be able to give to their people instruction in the arts, usages and habits of civilized life, and would understand the best method of communicating their knowledge to others. The laws also show as a definite object of equal importance the plan to educate young men for the ministry. From the evidence submitted, however, the trial court has found the fact to be that this plan was never carried out, although it was frequently referred to by contemporaneous writers as the eventual design of the school. But the fact was that the chief object of the school from 1835 to 1839 was the education of Hawaiian teachers for the common schools (Tr., p. 77). And the general meeting of the Hawaiian mission in 1842, replying to an appeal from the A. B. C. F. M. on the subject of theological education, resolved that—

> "it is inexpedient at present to attempt anything in the form of a theological school or seminary for the whole islands; but that it be recommended to the brethren of each island to confer together on this subject, enter upon the work as individuals, or where practicable designate one of their number, to devote such a portion of his time as he and they may deem proper to a class in theology." (Opinion Supreme Court, Tr., p. 45.)

And the act of July 11, 1850 (Civil Code, 1859, sec. 738), ratifying the acceptance of the school under the conditions contained in the agreement, shows the same chief purpose, it reading as follows:

> "Whereas, an arrangement has been made between the Hawaiian Government and the American Board of Commissioners for Foreign Missions, whereby the Seminary of Lahainaluna has been ceded to the King's Government, on condition that the Government undertakes its support; and whereas, it is desirable to have some institution, where Hawaiian youth can be properly educated for various occupations, therefore, the arrangement, where the Seminary of

> Lahainaluna has been surrendered to the King's Government, is hereby ratified and confirmed, and a reasonable sum shall be appropriated annually out of the public funds, for the support of said seminary, in pursuance of said arrangement."

In 1835, as is shown by the findings of fact (Tr., p. 74), the curriculum of Lahainaluna comprised arithmetic, geometry, trigonometry, algebra, navigation and surveying, history, Hawaiian grammar, sacred geography, languages, natural philosophy and moral philosophy, astronomy and chemistry.

In 1846 the curriculum of the school comprised geography, sacred and universal; history, sacred and profane; Hawaiian grammar, algebra, geometry, trigonometry, mensuration, surveying, linear drawing, sacred music, and a variety of miscellaneous branches (Tr., p. 77).

Between 1849 and 1877 the curriculum at the school underwent little change and the course of study is well indicated, as is found by the Supreme Court of Hawaii (Tr., p. 78), by the reports of the minister of public instruction for the years 1852 and 1862, which were as follows:

> "Their studies have been as follows: Algebra, Geometry, Trigonometry, Surveying, Navigation, Natural and Revealed Theology, Natural and Moral Philosophy, Anatomy, Hawaiian Laws, Chronology, Sacred Geography, Sacred History, Geography, Composition, Punctuation and Music."
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> Report Minister Public Instruction, 1852, p. 40 (Tr., p. 78).

> "The following is the course of study pursued by the several classes:
>
> Fourth or Freshman Class.
>
> Arithmetic, Geography, Chirography, Punctuation, English Language, Ancient History, Natural History, Chronology, Bible History, Chronology and Geography of the Bible, Hawaiian History.

Third Class.

Hawaiian Constitution, Bookkeeping, English, Anatomy, Algebra.

Second Class.

Geometry, English Language, Political Economy, Church History, Evidences of Christianity, Natural Theology, Moral Philosophy.

First or Graduating Class.

Trigonometry, Surveying, Navigation, Natural Philosophy, Optics, Astronomy, English Language, Theology.

Compositions, debates and declamations are required through the whole course."

Report President Board of Education, 1862, p. 8 (Tr., p. 78).

During these years, therefore, from 1835 to 1877, it is apparent that the primary purpose of the school was and continued to be the training of teachers for service in the common schools throughout the islands, and that such training consisted of a thorough grounding in mathematics, geography, history, natural philosophy, with some instruction in political economy, evidences of Christianity, moral philosophy, and elementary theology.

Plaintiffs, therefore, entirely failed to show that during these early years of the life of Lahainaluna religious instruction in amount or in kind was carried on in any manner essentially different from that in which, as will later be pointed out, it is being given today. This fact is of importance because of the allegation that religious instruction along the lines formerly pursued by the mission has ceased. No positive evidence other than that of the published curriculums to show the form of the early religious instruction appears in the record, and plaintiffs' theory that the substituted confession of faith was taught as a formal creed and in a

formal and technical way, as well as the claim that the school was primarily a training school for ministers, is wholly unsubstantiated by any proof which has been brought forward. This circumstance will be commented on later, but the fact as found by the court is that—

> "there is no evidence that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere" (Tr., p. 89).

Until 1863 the principals at Lahainaluna were chiefly missionaries connected with the American Board, reporting to it as well as to the Hawaiian Government (Tr., p. 78). From 1865 to 1877 the principal at Lahainaluna was Dr. Sereno E. Bishop, a missionary under the A. B. C. F. M. at the time of his appointment (Tr., p. 85), and later under the Hawaiian Evangelical Association (Tr., p. 87). It would, therefore, seem clear that the instruction given both in form and substance met the views of the men of that period, who were allied with the mission, and that it was, in their opinion, in conformity with the conditions of the agreement.

In 1863 the A. B. C. F. M. withdrew from active work in the Hawaiian Islands, and the Hawaiian Mission was organized as a self-supporting institution under the name of Hawaiian Evangelical Association. The American Board thereafter continued, and still continues, a fiscal agent in Hawaii, whose chief duty of recent years has been the payment of salaries to such of the original missionaries as are still living. Although this has been the chief duty of this agent, yet it is reasonable to suppose that during all of these years this agent would consider that his duty also included a general obligation to report to his principal concerning other matters in which that principal had an interest.

In the year 1864 the various documents going to make up the agreement in question were laid before the then Attorney General of Hawaii, and he gave an opinion to the president of the Board of Education concerning their construction. It is alleged that this was in response to a proposal to change the form of religious instruction. There is no evidence, however, to substantiate such claim (Tr., p. 79), and in the opinion itself the then Attorney General states that he was in doubt as to the point or points on which advice was asked. This opinion, therefore, does not seem to throw any light on the matters at issue here, but it is now referred to for the purpose of showing the failure of plaintiffs to prove the alleged plan to change the form of religious instruction and of traversing the allegation that Attorney General Harris refers in his opinion to the substituted confession of faith as "a much stronger instrument" than the first confession of faith. An examination of the opinion shows that no such statement was made.

In 1865 a direct controversy arose between the agent of the A. B. C. F. M. and the Board of Education respecting the right of such agent to nominate teachers at Lahainaluna. The correspondence comprising this controversy appears in the findings of fact (Tr., pp. 80 to 85, inclusive). The agent of the A. B. C. F. M. attempted to maintain that under the agreement he for his principal had a right to nominate the teachers at Lahainaluna. The Board of Education sharply dissented from this view, stating that in their opinion a full compliance with the contract would be made by the appointment of persons teaching in the doctrine and after the manner of the Congregational or Presbyterian churches of the United States, and notified the agent in their final letter (Tr., pp. 84 and 85) that if the view of the board were not satisfactory it would think favorably of a proposition to reconvey the property at once. No reply to this letter was made by Mr. Castle, the agent of the A. B. C. F. M., nor is there any evidence whatever in the record of any further

or other objection by the American Board or its agents along this or any other line concerning the management and the conduct of Lahainaluna.

In 1877 occurred a somewhat radical change in the school (Tr., pp. 85 to 87), this being the change from Hawaiian to English as the medium of instruction. This entailed, as is pointed out in the letter (Tr., p. 85) of Dr. Bishop, the then principal, who recommended the change, the giving up of instruction in certain studies of an abstract nature, such as moral philosophy, political economy, evidences of Christianity and the like, because instruction in such subjects could be given to Hawaiians only in their own language. Dr. Bishop expresses his reluctance in proposing the change in the medium of instruction because of the necessity of omitting these studies, but he nevertheless advised the change, because in his opinion such a change was desirable to promote the best interests of the general cause of education throughout the islands.

From that time, therefore, of necessity, the more abstract subjects ceased to be taught at Lahainaluna as they had formerly been taught, and it is to be noted in this connection that this change was brought about upon the recommendation of Dr. Bishop, a missionary of the A. B. C. F. M. himself before and a missionary of the Hawaiian Evangelical Association after his principalship at Lahainaluna, and upon the motion of the fiscal agent of the A. B. C. F. M., Mr. E. O. Hall, who at that time was a member of the Board of Education (Tr., p. 87).

From July 1, 1877, down to the present time, the principals at Lahainaluna have been neither ministers nor missionaries and there is no evidence that those representing the A. B. C. F. M. or the mission in Hawaii were ever consulted respecting their selection or respecting the conduct of the school (Tr., p. 87). From July 1, 1877, to the present time, the course of study at Lahainaluna has comprised practically the same subjects which were taught prior to that

date, with such changes only, from time to time, as have occurred in the teaching of these same subjects in all schools of like grade throughout the United States. The findings of fact of the Supreme Court of Hawaii (Tr., pp. 87 to 89, inclusive) show clearly the general scope, the continuity and growth of this course of instruction. An examination of the extracts from the various reports of the Board of Education at different times will show that the only difference in kind between the curriculum of the school during the period since 1877 and that in use during the period prior to 1877 is the omission therefrom during the latter period of such studies as moral philosophy, evidences of Christianity, and theology.

This omission, as has been pointed out, first occurred because of the change in the medium of instruction from Hawaiian to English in 1877.

But, as the Supreme Court of Hawaii has found the fact to be, the omission of studies of this character from the regular curriculum does not mean that religious instruction has been entirely omitted. Basing their conclusion upon a large amount of oral testimony given by graduates and teachers of the seminary and covering the years from 1877 down to the present time, the the Supreme Court of Hawaii found that since 1877 the course of religious instruction had been substantially the same, and that it included morning prayer, with occasional discussions of passages of the Scriptures, compulsory attendance at Sunday school, with the preparation of the International Sunday School lessons furnished by the Hawaiian Board itself, and compulsory attendance at Christian Endeavor exercises at which the pupils discussed biblical subjects based upon the topic for such meeting as given in the *Christian Endeavor World* (Tr., pp. 89, 90).

It is to be noted that no proof was made, nor indeed any evidence offered, to sustain the allegation in the petition (Tr., p. 6) that a part of the agreement on the part of the Government was to continue in Lahainaluna the teaching

of the religious doctrines summarized in the confession of faith referred to in the correspondence making up the agreement. As the facts are found by the Supreme Court of Hawaii, it must be borne in mind that there is no evidence whatever that the second confession of faith, Exhibit F1, attached to the petition (Tr., p. 15), was ever before the Prudential Committee of the A. B. C. F. M. or acted upon by it (Tr., p. 73). Possibly, then, this confession of faith does not properly constitute a part of the agreement. Furthermore, Dr. Bishop, who was principal at Lahainaluna from 1865 to 1877, testified that he had never seen this confession of faith until it had been shown to him in connection with the present case, but that it very well represented the form of doctrine taught at Lahainaluna. These facts negative any contention that a part of the agreement was the teaching of the contents of this confession of faith as a formal doctrine or creed, and support the conclusion of the Territorial Supreme Court that there has been a substantial compliance with the agreement in the matter of religious instruction. It is to be doubted if the founders of this school or any of their successors have had a higher standard of duty than that testified to by the present principal of Lahainaluna (Tr., p. 90), that his effort, while not teaching any formal creed, had been to make of the boys of the school "upright, truthful Christian men."

Nor is there any suggestion in the letter of Dr. Bishop recommending this change (Tr., p. 85) that there would be any change either of form or substance in the religious instruction given at the school. If the change in the language to be used would have required a change of so important, and, as is argued for plaintiffs, so vital, a character, it is very unlikely that the letter of recommendation would have failed to contain some comment. Especially would this seem to be probable when Dr. Bishop's training, associations, connection with the Mission, and position at the school are considered. This silence points directly to the conclusion that

no change, worthy the name, was being recommended or even considered in this particular. And this conclusion becomes irresistible when the rule of interpretation laid down by this court in its first opinion (206 U. S., 203) is applied, that is, when the meaning of the contract is determined from the long-continued practice under it. Even if in its inception the contract may have contemplated the teaching of the doctrines of the confession of faith in a formal manner, that requirement never having been met either before or after the contract was made, and the finding of the Supreme Court of Hawaii being that there is no evidence that this confession of faith was taught at any period at Lahainaluna as a creed, doctrine or standard of religious instruction (Tr., p. 89), this claim of plaintiffs is wholly without foundation.

This court held in its former opinion upon the first appeal (206 U. S., 206) that the condition respecting religious instruction was unchanging and as binding today as when made, and that it intended and should be construed to require the giving of religious instruction. Following the law of the case as thus settled, the Supreme Court of Hawaii held that under the agreement religion should be taught and that as taught it should not be contrary to the doctrines indicated in the substituted confession of faith. Thus construed, considerable latitude as to the amount of such instruction is of necessity allowed. The criterion of the amount and nature of such religious instruction under the law of this case, as laid down in the former opinion, is the religious instruction given at Lahainaluna prior as well as subsequent to the contract, as shown by the long-continued and uniform procedure at such school. The findings of fact certainly show no subsequent change to have ever occurred.

No evidence whatever and no suggestion nor argument has been made that any teaching contrary to the doctrines embodied in the confession of faith has ever been given. This phase of the matter need not be considered further. Under the evidence the only questions are whether religious studies

should form a part of the curriculum, or if this is not requisite, then as to the amount of religious instruction which should be given. As has been shown, the curriculum was changed because of the change from Hawaiian to English. It has also been shown that there is no evidence to prove, nor any good ground to claim, that religious studies should form a part of the curriculum, or that religious instruction along the lines formerly pursued by the Mission has ever ceased. If extrinsic evidence is to be considered in determining what the agreement intends and includes, then the acts done in the year 1877 are of as much value to determine the true interpretation of the agreement as the acts of the year 1835 or of any year prior thereto. And these acts permit of but one reasonable conclusion, which is that a substantial compliance with this part of the contract has been made.

It is alleged and may be contended that the technical and agricultural features of the instruction given at Lahainaluna show that the school is not now being maintained as a school for the cultivation of sound literature and solid science. The evidence shows that technical and agricultural training have been prominent features of the school for more than half a century. The findings of the Supreme Court make this fact so apparent as to make it practically impossible for a serious argument to be made that the changes, if any, in this regard have been anything more than changes in degree (Tr., pp. 90, 91). Certainly the curriculum of 1906 (Tr., pp. 88, 89) includes more sound literature and solid science than was included in the curriculum of 1835 or of any of the early years of the school's existence, and differs but little from that of 1900 (Tr., p. 88), as to which year no breach is claimed to exist. It is noteworthy in this connection that plaintiffs fail to assign this conclusion of the court as error, thus apparently abandoning this claim of a breach. It is also a fact that there has been no change in the official designation of the school (Tr., p. 90). The allegation, therefore, in the petition (Tr., p. 5) that the institution has become a techni-

cal school, under the name of "The Lahainaluna Agricultural School," is not the fact.

From these considerations and this résumé of the evidence before the court, showing a uniform construction of this contract from 1849, as well as a uniform practice at the school since 1835 down to the present time, with no objection on the part of any party, it is submitted that the conclusion of the Hawaiian Supreme Court is fully justified; that a substantial compliance with the conditions of the agreement has been continuously made, and that there was no breach in September, 1903, as to the giving of religious instruction, or in July, 1904, as to the giving of instruction in sound literature and solid science.

This brings the argument to the second reason for the claim of the Territory that the judgment of the Territorial Supreme Court was correct.

(*b*) If any breach of the condition respecting religious instruction has occurred, it occurred as early as 1877, and any action therefor is barred by the statute of limitations.

As stated, the construction placed upon the agreement by this court on the former appeal is that religion must be taught, and that as taught it must not be contrary to certain doctrines. The findings of fact, as pointed out in the discussion above, show that up to 1877 certain studies of a religious character and abstract nature formed a part of the curriculum, and that since that time no such studies have been included as a part of the school curriculum, and also show that since 1877 religious instruction has been given, and as given has been substantially the same. Whether, therefore, the agreement respecting religious instruction is to be construed to mean that religious studies should form a part of the curriculum, or is to be construed as requiring only that religious instruction not contrary to certain doctrines should be given, it is apparent that the agreement, if broken at all, was broken as early as 1877, and not in Sep-

tember, 1903, as alleged. If so an action for such breach was long since barred by the statute of limitations covering suits of this character, because a suit against the Territory must be begun within two years from the time the claim first accrues. That statute, section 2004, Revised Laws of Hawaii, reads as follows:

> "Every claim against this Territory, cognizable as aforesaid, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within two years after the claim first accrues; provided, that the claims of persons under legal disability shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within one year after the disability has ceased."

And see—

Hartman *v.* United States, 35 Ct. of Cls., 106.
Butler *v.* United States, 23 Ct. of Cls., 335.
Carlisle *v.* United States, 29 Ct. of Cls., 414.
Aachen & Munich Fire Ins. Co. *v.* Martin, 156 Fed., 654.
Brown *v.* Houdlette, 10 Me., 399.
Davis *v.* Brown, 98 Ky., 475; 32 S. W., 614; 36 S. W., 534.
Wilcox *v.* Plummer's Exrs., 4 Pet., 172; 7 L. Ed., 821.
Finn *v.* United States, 123 U. S., 227; 31 L. Ed., 128.
United States *v.* Connor, 138 U. S., 61; 34 L. Ed., 860, 862.
United States *v.* Greathouse, 166 U. S., 602; 41 L. Ed., 1130.
United States *v.* Wardwell, 172 U. S., 48; 43 L. Ed., 360.

In a suit of this nature, a claim against the Territory, the question of the barring of the action under the statute of limitations is jurisdictional and cannot be waived by the Territory nor disregarded by the court. It therefore was incumbent on the court to inquire specially into the question of the time when this claim first accrued in order to ascertain whether plaintiffs have brought their action within the confines of the statute. Unless in all respects the claim here made is within the statute, no judgment could be given in favor of the plaintiffs.

Finn *v.* United States, 123 U. S., 227; 31 L. Ed., 128.
Kendall *v.* United States, 107 U. S., 123; 27 L. Ed., 437.
De Arnaud *v.* United States, 151 U. S., 483; 38 L. Ed., 244, 248.
United States *v.* Wardwell, 172 U. S., 48; 43 L. Ed., 360.

As has been pointed out, the change in the medium of instruction which entailed the dropping of studies of a theological nature from the curriculum, and which has been the only substantial change in the history of the school, occurred because of the recommendation of Dr. Bishop (Tr., p. 85), a missionary of the A. B. C. F. M., of the Hawaiian Evangelical Association before and after his services at Lahainaluna, and upon the direct motion of Mr. E. O. Hall, the agent of the A. B. C. F. M. and a member of the Board of Education, the letter of Dr. Bishop not even suggesting that any real change in the matter of religious instruction would follow. And from 1877, when this change occurred, until 1903, a period of twenty-six years, during all of which time the A. B. C. F. M. had its representatives in Hawaii and during all of which time the Hawaiian Evangelical Association was maintaining its work in the islands, no objection of any sort to the conduct of affairs at Lahainaluna by the Government was made by

either body. It is safe to suppose that plaintiffs would have offered in evidence to sustain the allegation of breach of contract embodied in their complaint against the Territory all objections of this character which were made by any one in authority. But no proof of any objection of this nature was made. On the contrary, the silence would tend to show an acquiescence on the part of all concerned. As said by the Supreme Court of Hawaii,

> "to the present day there has been no protest from the American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs, who were trustees of certain property rights under deed from the American Board, the terms of which will be more fully considered later."

It follows that whatever right of action there may have been because of any change in the giving of religious instruction at Lahainaluna first accrued at least as early as 1877.

Plaintiffs attempt to avoid the running of the statute of limitations in this case by the ingenious theory that the cause of action did not accrue until the refusal by the Territory of their demand for a conveyance of the property or the payment of $15,000. This refusal on the part of the Territory occurred at a conference between plaintiffs' attorney and the Governor and Superintendent of Public Instruction of the Territory a few months prior to the commencement of the suit (Tr., p. 98), the date of such refusal being alleged as on or about September 1, 1904 (Tr., p. 7). The Territory argued before the Supreme Court of Hawaii and now submits, that the cause of action alleged is a breach of the agreement to teach certain religious doctrine and sound literature and solid science, as a result of which breach it is claimed that $15,000.00 is due plaintiffs as liquidated damages. This breach is denied by the Territory and the issue joined was upon this question. In every contract there is present a promise to pay such damages as may occur upon

a breach. This promise is either implied or, as in this agreement, is expressed. The alternative obligation assumed by the Hawaiian Government to either convey the land or to pay in lieu of such conveyance the sum of $15,000.00 is merely a statement of the remedies which might be sought if the provisions of the agreement were broken. Whether the remedy is expressed or implied makes no difference, when the question is as to a breach of the agreement, and therefore no difference when it becomes important to determine the exact cause of action. The remedy is one thing, and the cause of action—that is, the alleged breach—another. As pointed out, the cause of action here alleged is the failure to comply with the conditions of this agreement respecting instruction, not a failure to comply with the alternative obligation to convey or to pay after it had been fixed and binding. This theory, therefore, does not save plaintiffs from the legal result of the holding of the Supreme Court of Hawaii that if broken at all, the condition respecting religious instruction was broken as early as 1877.

Another theory which may be urged by plaintiffs to avoid the running of the statute against this claim is that the contract is a continuing contract; that therefore any breach has been a continuing breach, and the statute does not run against an action therefor. This contention, if made, is practically an admission that plaintiffs have failed to prove the breach alleged and therefore desire to secure the benefit of whatever breach can be considered to have occurred in 1877. It is submitted that this contract is not like those contracts imposing a continuing obligation, such as for support and maintenance, to which this rule has been applied. In this case there has been but one breach, if any, and immediately upon the happening thereof the right of action accrued. This is not a case where the parties suing get or can claim or show actual damage. The agreement itself recognizes this by the provision for the alternative relief in case of breach, and this relief, in its entirety, could have been

had at once upon the failure or refusal to perform by the Hawaiian Government. To this case, therefore, the rule should be applied that the statute runs from the time when the claim first became perfect and complete. Especially is this so in view of the statute concerning the bringing of actions against the Territory (section 2004, Revised Laws of Hawaii, *supra*).

Hartman *v.* United States, 35 Ct. of Cls., 106.
Butler *v.* United States, 23 Ct. of Cls., 335.
Carlisle *v.* United States, 29 Ct. of Cls., 414.
Davis *v.* Brown, 98 Ky., 475; 32 S. W., 614; 36 S. W., 534.
Wilcox *v.* Plummer's Exrs., 4 Pet., 172; 7 L. Ed., 821.
Kendall *v.* United States, 107 U. S., 123; 27 L. Ed., 437.
Finn *v.* United States, 123 U. S., 227; 27 L. Ed., 128.
United States *v.* Connor, 138 U. S., 61; 34 L. Ed., 860, 862.
United States *v.* Greathouse, 166 U. S., 602; 41 L. Ed., 1130.
United States *v.* Wardwell, 172 U. S., 48; 43 L. Ed., 360.

Another claim which may be made by plaintiffs on this phase of the case is that by this agreement a trust was created, and therefore the statute would not run. The contract itself negatives this contention. In substance, the agreement was that in consideration of the waiver of a certain claim by the American Board before the Land Commission in 1849, the Hawaiian Government undertook to carry on certain educational work at Lahainaluna as it had formerly been carried on, with regard both to religious instruction and the teaching of sound literature and solid science, which work the American Board had found too burdensome. It was further agreed that if any breach of this obligation should

occur the American Board could secure either a conveyance of certain property or as an alternative a money payment. By the terms of the contract itself, therefore, the remedy of the board was limited to relief in the nature of liquidated damages, a remedy cognizable in a court of law. This agreement is an ordinary legal contract, for the breach of which the usual remedy—that is, an action for damages—and no other is open. The Territory submits that there is nothing in this contract which would create a trust. The property itself was not transferred subject to any trust imposed upon it, nor is there any clear specification of the nature of the trust itself. A contract will not be considered to have created a trust unless it can be clearly and definitely ascertained what the purposes of the trust are and who can claim under it as beneficiaries. These essential elements are lacking in this case.

Contracts under which a person receives property and assumes mere personal liability, the property itself not being impressed with the character of a trust fund, are enforceable as contracts but do not create a trust.

Riddle *v.* Beattie, 77 Ia., 168.

But even if it could be considered that the agreement before the court constitutes in some aspects a trust, then it is submitted that it is not such a trust as would be exempt from the operation of the statute. Not all trusts are so exempt. The only class of trusts not affected by the statute are, in the language of Chancellor Kent,

> "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction"

of courts of equity.

Kane *v.* Bloodgood, 7 Johns. Ch., 90; 11 Am. Dec., 417.

Whenever there is an adequate remedy at law the statute will be held to apply, even though relief may be sought in equity, and the statute will run from the time the first cause of action accrues.

Jewell *v.* Jewell, 139 Mich., 578.
Hayward *v.* Gunn, 82 Ill., 385.
Agens *v.* Agens, 50 N. J. Eq., 566.
Roberts *v.* Ely, 113 N. Y., 128.
Egerton *v.* Logan, 81 N. C., 172.
Townsend *v.* Eichelberger, 51 Ohio St., 213.
Hostetter *v.* Hollinger, 117 Pa. St., 606,
Wallace *v.* Lincoln Bank, 89 Tenn., 630.
Merton *v.* O'Brien, 117 Wis., 437.
Cone *v.* Dunham, 59 Conn., 145.
Farnam *v.* Brooks, 9 Pick (Mass.), 212, 242.
Merril *v.* Monticello, 66 Fed., 165; 72 Fed., 462.

The Territory therefore submits that it was not error for the Supreme Court of Hawaii to find that if any breach had occurred respecting religious instruction, it occurred as early as 1877, and any claim therefor is barred by the statute of limitations.

(*c*) The findings of fact from which the conclusion reached by the Supreme Court of Hawaii necessarily follows are binding and conclusive upon this court.

It is settled law that the findings of fact of a territorial Supreme Court are conclusive upon this court. Therefore, this court is bound to follow the finding that "from 1877 to the present date the course of religious instruction has been substantially the same" (Tr., p. 89) from which it necessarily follows both that there has been a substantial compliance with this condition of the transfer and that any breach which may have occurred respecting the matter of religious instruction occurred in the year 1877, and not, as

alleged, in September, 1903; and the findings as to the curriculum in 1900 and 1906 (Tr., pp. 88, 89) from which it necessarily follows that as much, if not more, sound literature and solid science is now being taught as at any time in the history of the school, there being, therefore, no breach in July, 1904, as claimed. In view of these findings of fact, the judgment of the Supreme Court of Hawaii for defendant must be affirmed.

Halsell *v.* Renfrow, 202 U. S., 287; 50 L. Ed., 1032.
San Pedro, etc., Co. *v.* U. S., 146 U. S., 120; 36 L. Ed., 911.
Zeckendorf *v.* Johnson, 123 U. S., 617; 31 L. Ed., 277.
Eilers *v.* Boatman, 111 U. S., 356; 28 L. Ed., 454.
Sturr *v.* Peck, 133 U. S., 541; 33 L. Ed., 761.
Sims *v.* Sims, 175 U. S., 162; 44 L. Ed., 115.
Holloway *v.* Dunham, 170 U. S., 615; 42 L. Ed., 1165.
Idaho, etc., Co. *v.* Bradbury, 132 U. S., 509; 33 L. Ed., 433.
Grayson *v.* Lynch, 163 U. S., 468; 41 L. Ed., 230.

(*d*) Plaintiffs are not entitled to maintain this or any cause of action for a breach of this agreement.

Entirely aside from a consideration of the substantial rights involved another reason exists for the rendition of judgment for defendant, which is that plaintiffs are not entitled to bring this cause of action and therefore not entitled to any judgment against defendant.

As has been found by the Supreme Court of Hawaii, the right of plaintiffs to maintain the action is based upon a certain deed which is set forth in full in the findings of fact (Tr., p. 98). By this deed the A. B. C. F. M. conveyed certain property to Messrs. Lowrey, Waterhouse, and Smith, as trustees for the Hawaiian Evangelical Association. By deed

properly executed George P. Castle was duly substituted as a trustee in the place and stead of Mr. Waterhouse. The property conveyed consists of—

> "all and singular the lands and real estate situate in said Territory of Hawaii belonging to said grantor, described and particularly referred to in the schedule hereunto annexed, marked Schedule A, reference to which is hereby made and the same made a part hereof, together with all other lands in the possession of or belonging to said grantors or in and to which said grantor has any right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intents and purposes as though a particular description thereof were herein incorporated and included in said schedule."

No mention of Lahainaluna is made in the schedule and the only possible ground upon which plaintiffs can claim that the deed covers the cause of action here alleged is that a claim to a sum of money in the nature of liquidated damages, which defendant has the option of paying as an alternative to the conveyance of certain property upon breach of a condition in an agreement, is covered by the language above quoted. But as will be observed, the only property covered by the deed is real property, and using such term in the broad sense as inclusive of equitable rights in real property as well as legal rights no chose in action can be held to have been transferred. Furthermore, upon their own pleadings plaintiffs are concluded from claiming that their right is a right in lands. If they had sued for a conveyance of the property their contention would have been stronger, but they have chosen to proceed upon the theory that the option has been exercised by the actions of the Territory and the $15,000.00 is absolutely due. Plaintiffs also have claimed that this debt did not accrue until after the date of the execution and delivery of the deed. The language quoted above clearly does not include a claim to money, nor could it by

any possibility include any such claim which did not accrue until after the deed had been executed. For this reason alone, plaintiffs are not entitled to judgment.

The Territory further submits that even if an attempt was now being made to secure a conveyance, plaintiffs could not successfully maintain such claim under this deed, because whatever right existed in the A. B. C. F. M. respecting either the conveyance of the property or the payment of a sum of money as the alternative of such conveyance, depends upon and exists only by virtue of the contract. The A. B. C. F. M. never had title to the lands of Lahainaluna. Their relinquishment before the Land Commission of their claim to the Lehainaluna lands has been found by the Supreme Court of Hawaii (Tr., p. 73) and is admitted by defendant to be consideration for the contract. The fact remains, nevertheless, that the lands of Lahainaluna never belonged to plaintiffs, and their sole right respecting Lahainaluna is the alternative contractual right arising only after a breach of the agreement. This contractual right to liquidated damages is not a right in lands, either legal or equitable. By the terms of the contract itself upon proof of breach defendant, that is, the Territory, and its predecessors became liable either to convey certain property or to pay a definite sum of money, and the A. B. C. F. M. had only a contractual right to such alternative relief. By no reasonable construction of the deed can any such contractual right, an inchoate chose in action until a breach occurred, be said to have passed to plaintiffs.

It may be objected by plaintiffs that this contention of the Territory's could have been raised upon demurrer, and not having been so raised is therefore waived. The allegations of the complaint (Tr., pp. 5, 6, 7) that petitioners are the owners of the claim against the Territory would seem to preclude the defendant from raising this point on demurrer because by demurring it became necessary to admit for such purposes the alleged facts. Furthermore, since this is an

action against the Territory, it is submitted that a waiver of any defense could not occur as a matter of law. No public officer by either his positive act or by his failure to claim some defense can waive on behalf of the Territory a clear legal right. There can no more be a waiver of a defense that plaintiff is not the owner of the claim presented than of a defense that the statute of limitations has run. It is the duty of the court of its own motion to either dismiss the suit or give judgment for defendant whenever it finds that the claim as disclosed by the evidence is either barred by the statute or does not belong to the claimants.

Peacock *v.* Republic of Hawaii, 11 Haw., 404.
Kendall *v.* U. S., 107 U. S., 123; 27 L. Ed., 437.
Carlisle *v.* United States, 29 Ct. of Cls., 414.
Finn *v.* United States, 123 U. S., 227; 31 L. Ed., 128.
Christie Street Com. Co. *v.* United States, 129 Fed., 506.
De Arnaud *v.* United States, 151 U. S., 483; 38 L. Ed., 244, 248.
United States *v.* Utz., 80 Fed., 851.

The conclusion, from this consideration, is that plaintiffs have no standing in court to maintain this action and a judgment in their favor would not bar any action which might be brought by the A. B. C. F. M. And this circumstance makes of greater importance the fact that no claim of any sort has ever been advanced by the A. B. C. F. M. nor by plaintiffs' *cestui que trust* under the deed (Tr., pp. 53, 90).

II.

THE TERRITORY WAS PROPERLY ALLOWED TO ANSWER AND PLAINTIFFS WERE NOT ENTITLED TO JUDGMENT UPON THE OVERRULING OF THE DEMURRER.

The first two assignments of error (Tr., p. 69) raise in substance but the single question of the legal effect of the decision of this court reversing the first decision of the Supreme Court of Hawaii.

From the statement of the case it appears that the Territory first demurred to the complaint on various grounds; that after argument the demurrer was sustained by the Hawaiian Supreme Court; and that upon appeal to this court the decision sustaining the demurrer was reversed, and this court, in the language of the opinion, remanded the case "with directions to proceed in conformity with this opinion" (Tr., p. 33). The usual mandate was issued pursuant to the decision, and containing the same directions.

On September 14, 1907, the Territory filed its answer, denying generally, as is the practice in Hawaii, all allegations of the complaint (Tr., p. 33). On February 17, 1908, the case came on for trial and plaintiffs moved for judgment on the record upon the ground that the decision of this court upon the prior appeal had disposed of the whole case. This motion was denied (Tr., pp. 34, 35, 36). Upon these facts the alleged errors now being considered are based.

The Territory contends that it was properly allowed to put in issue the alleged facts stated in the complaint, and that plaintiffs were not entitled to judgment on the record after the decision of this court, in effect overruling the demurrer.

It is fundamental that by filing a demurrer a defendant raises only questions of law upon the pleadings, and that for this purpose only are the alleged facts admitted. Upon demurrer, the real question is whether defendant is obliged

as a matter of law to proceed further—that is, whether a legal cause of action is stated against him. The demurrant does not admit for all purposes that the allegations of the complaint are facts, but assuming those allegations to be facts as stated he objects to their alleged legal effect as against him. This was the issue first before the Supreme Court of Hawaii, and that court sustained the demurrer. On appeal to the Supreme Court of the United States, therefore, the same issue existed, and only such issue. This court in deciding the question then before it decided only that a legal cause of action was alleged upon the assumption that the statements of the complaint were facts. That this is the meaning and effect of this decision appears, it is submitted, from the decision itself, as well as being the conclusion to be drawn from the general rules of law applicable.

The opinion of the court, reported in 206 U. S., printed also on pages 29 to 33 of the transcript of this record, shows that the main question there considered was as to the necessity and competency of extrinsic evidence to explain the various documents evidencing the contract made between the Kingdom of Hawaii and the representatives of the A. B. C. F. M. Connected with this main question, and considered with it, was the question of construction as to whether the agreement required the giving of religious instruction along certain lines, or required merely that no instruction in conflict with certain doctrines be given. This court held that extrinsic evidence to explain the agreement was admissible, and that the agreement required certain religious instruction to be given. In reaching this conclusion the court says:

> "It is insisted, however, by the appellee that the agreement is clear and unambiguous and that it does not present a case for the resort to extrinsic evidence. We cannot concur with this view" (Tr., p. 30).
> * * *
>
> "It must be remembered that we are considering a transaction which occurred in the Hawaiian Islands

in 1849, and by the conditions of that time were the acts of the parties induced. Besides, the agreement is not in a formally executed paper. It is found in a correspondence, and is constituted and explained by the whole of the correspondence, and taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose" (Tr., p. 30). * * *

And further in the opinion, after holding that positive religious instruction was contemplated by the parties to the agreement, the court says:

"Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be" (Tr., p. 31).

And after quoting with approval the remark in Brooklyn Life Insurance Co. *v.* Dutcher, 95 U. S., 269, where it is said "There is no surer way to find out what parties meant than to see what they have done," the court says:

"So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires" (Tr., p. 32). * * *

And again:

"'Religious instruction,' it is alleged, 'upon the lines formerly pursued by the Mission and subse-

quently by the government, in accordance with the agreement, was continued up to about September 1, 1903.' We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning—proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words which, at the end of half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward" (Tr., pp. 32, 33). * * *

And the opinion concludes:

"Judgment reversed and case remanded, with directions to proceed in conformity with this opinion" (Tr., p. 33).

From these statements but one conclusion can reasonably be drawn, which is that the legal meaning and effect of the documents going to make up the written evidence of this contract should be determined in the light of the things done thereunder. Holding as it did, that extrinsic evidence was admissible to explain the meaning of the contract, this court certainly did not intend that no evidence at all was to be received, or that judgment on the record should be entered. If such had been the conclusion of this court—if it had intended to bar the Territory from showing, if it could do so, either that the allegations of the complaint were not the facts or that other facts existed which constituted a clear defense to the action, then the mandate to the lower court would have been framed in different language. Under the authority of section 701, R. S., this court could have rendered its judgment of reversal with such directions to the Supreme Court of Hawaii as would have prevented any trial of the facts. But instead of doing so, it directed the

Hawaiian Supreme Court to proceed with the case in conformity with the opinion, that is, to proceed to hear the evidence and to decide in the light of such evidence whether or not the plaintiffs were entitled to the relief asked for. This course was followed by the lower court, and it is urged that in view of the language quoted above from the opinion, no other course could have been pursued. Bearing in mind that the issue presented on demurrer was one of law solely, the language of the opinion indicates that the intention of this court was to require an examination into the facts in order that a just interpretation of an informal contract made at the middle of the last century might be had. In reaching this conclusion, this court necessarily sustained the contention of plaintiffs on the first appeal, which was that extrinsic evidence could and should be received as an aid to the construction of the contract they advanced. This being so, it is now somewhat staggering to be told, by these same successful plaintiffs, that no such evidence should have been received; that it was error for the Territorial Court to permit the Territory to answer and put in issue the alleged facts; and that it was error for such court to refuse to give judgment for plaintiffs on the record alone, which record consisted only of a complaint, and a mandate from this court to proceed.

With justice as the sole criterion, such a judgment could not be contemplated, and the Territory submits that the judgment and mandate of this court on the former appeal does not permit of such a conclusion.

The mandates of this court are to be interpreted so as not to work injustice.

> Story *v.* Livingston, 13 Pet., 359; 10 L. Ed., 200.
> Wayne Co. *v.* Kennicott, 94 U. S., 498; 24 L. Ed., 260.

Only such questions as are before this court are concluded by its decision, and when a mandate issues, directing, not the entry of final judgment, but further proceedings not in-

consistent with the opinion, the lower court may consider and decide all matters left open agreeably to settled rules of practice.

Re Sanford Fork & Tool Co., 160 U. S., 247; 40 L. Ed., 414.
Smale *v.* Mitchell, 143 U. S., 109; 36 L. Ed., 90.
Ex parte Union S. S. Co., 178 U. S., 319; 44 L. Ed., 1085.
Re French, 91 U. S., 423; 23 L. Ed., 249.

The judgment of this court being in effect one overruling the demurrer, the case stood as if the Territorial Supreme Court had overruled the demurrer.

United States *v.* Boyd, 15 Pet., 187; 10 L. Ed., 706.

And the judgment in this case was similar to a judgment of this court in effect overruling exceptions to an answer in chancery and holding the answer sufficient, which judgment was held not to deny to plaintiffs the right to file a replication.

Re Sanford Fork & Tool Co., *supra.*

And this court has held that even a judgment on the merits in ejectment, on writ of error from a State court, would not bar a subsequent action on the same facts, when the State statute permitted such action to be brought within a specified time.

Smale *v.* Mitchell, 143 U. S., 109; 36 L. Ed., 90.

From these decisions and in view of the provisions of section 702, R. S., it would seem that the rule is well settled that when further proceedings are permitted by the judgment and mandate of this court such procedings may be had as conform to the rules of practice of the jurisdiction where the cause is at issue.

It is the settled practice in Hawaii that a defendant may answer after the overruling of a demurrer.

Silva *v.* Inter-Island S. S. Co., 18 Haw., 328.
Lowrey *v.* Hawaii, 17 Haw., 225.
Lloyd *v.* Hawaii, 19 Haw., 520.
Matsumura *v.* County of Hawaii, 18 Haw., 18, 496.

And the same rule of practice exists in so many other jurisdictions as to make it very nearly universal.

Seale *v.* McLaughlin, 28 Cal., 668.
Cheney *v.* Cross, 181 Ill., 31.
Chicago, etc., Ry. Co. *v.* Adams, 12 Ind. App., 317.
Hillis *v.* Ryan, 4 Green, 78.
Blases *v.* Grant County Bank, 101 Ky., 163.
Gughleilhmi *v.* Geismar, 46 La. Ann., 280; 14 So., 501.
Jefft *v.* McNoah, 9 Mich., 201.
Potter *v.* Holmes, 74 Minn., 508.
Smythe *v.* Graecen, 89 N. Y. Suppl., 111.
Providence Mutual Ct. *v.* McElroy, 19 R. I., 40.
Gordon *v.* Yost, 140 Fed., 79.

It is likewise well settled that admissions by demurrer are not evidence for the party alleging them as facts.

Doolittle *v.* Branford, 59 Conn., 402.
Lawler *v.* Cauch, 80 Ind., 369.
Bush *v.* Madeira's Heirs, 53 Ky., 172.
Jacobs *v.* Vaill, 67 Kan., 107.
Bijou Co. *v.* Lehman, 118 La. Ann., 956.
Hill *v.* Gould, 129 Mo., 106.
Anheuser-Busch Brewing Asso. *v.* Bond, 66 Fed., 653.

Furthermore, this is a claim against the Territory, and the statute under which it is brought does not require of the Territory any pleading, but does of necessity require of the

Supreme Court a careful examination into the facts involved. The court would not be justified in any case in giving judgment against the Territory without a full inquiry into the merits of the claim, and would be under the obligation of raising of its own motion any question of fact or law which might bar the claim, whether raised by plea or not.

Kendall *v.* U. S., 107 U. S., 123; 27 L. Ed., 437.
Finn *v.* U. S., 123 U. S., 227; 31 L. Ed., 128.

It is, therefore, submitted that it was not error for the Hawaiian Supreme Court to permit defendant to answer, nor error for it to refuse to grant plaintiffs' motion for judgment on the record.

Neither as a matter of law or of equity are plaintiffs entitled to the relief they now ask, nor in view of the facts before this court, the history of Lahainaluna, the conditions which led up to the making of this agreement and the long continued practice under it, which show a faithful, efficient, and generous administration of affairs at that school on the part of the Government of Hawaii, should any judgment in their favor be now rendered. The judgment of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

C. R. HEMENWAY,
Attorney General of Hawaii, for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 469.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH, TRUSTEES, APPELLANTS,

vs.

THE TERRITORY OF HAWAII, APPELLEE.

MOTION TO ADVANCE AND SET CAUSE FOR HEARING.

Comes now David L. Withington and Charles H. Olson, Attorneys for the appellants in the above entitled cause, and move this honorable court that this cause be advanced and set for hearing either on the second or third Monday in November.

This motion is based upon the record in said cause, which shows that the same has been once before this court on demurrer and decided on the merits; substantially all the facts which appear on this appeal being set forth in the petition passed on by this court in its decision on said prior appeal in 206 U. S. 476.

Dated WASHINGTON, D. C., *October* 11, 1909.

DAVID L. WITHINGTON,
C. H. OLSON,
Attorneys for Appellants.

LOWREY *v.* TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 469. Argued December 6, 1909.—Decided January 24, 1910.

The decision and opinion of this court in *Lowrey* v. *Hawaii*, 206 U. S. 206, construed and followed as to construction of contract involved and liability thereunder of the Hawaiian government.

A condition to teach a definite Christian doctrine is not satisfied by teaching merely a form of general evangelical Christianity.

Where the breach of a covenant of use entails either forfeiture or payment of a specified sum, the grantee has the right of election until disavowal on his part and denial of the alternative obligation, and until then, notwithstanding a continuous breach, the statute of limitations does not run against the grantor.

A deed of trust conveying all lands of grantor or in which it has any interest held in this case to include its right to a liquidated sum in lieu of right of reëntry for a breach of covenant of use of lands theretofore conveyed by it.

19 Hawaii, 123, reversed.

THE facts are stated in the opinion.

Mr. David L. Withington for appellant:

It is law of this case that the terms of the agreement require the inculcation of general learning and knowledge accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government, *Lowrey* v. *Hawaii*, 206 U. S. 206, and it is as much a breach to fail to teach doctrine as to teach religion.

The condition for religious teaching is unchanging, definite and absolute to-day. No waiver or statute of limitation bars the action.

A trust of this kind for religion is valid, and, so long as there is anyone in interest demanding its fulfillment, must be

carried out. *Watson* v. *Jones*, 13 Wall. 679. The general doctrines of Christianity are a part of the common law of the country and we are a Christian people. *Holy Trinity Church* v. *United States*, 143 U. S. 457. And see *Vidal* v. *Girard's Executors*, 2 How. 127; *Free Church* v. *Overtown*, L. R. 1904, A. C. 515.

While an independent church may by majority vote change its views as held in *Wiswell* v. *Congregational Church*, 14 Ohio St. 31; *Keyser* v. *Stansifer*, 6 Ohio, 363; *Trinitarian Cong. Soc.* v. *Union Cong. Soc.*, 61 N. H. 384; *Fadners* v. *Braunborg*, 73 Wisconsin, 257; *Landis' Appeal*, 102 Pa. St. 467, that is not the case where the church has been founded for a particular form of worship and doctrine; in such case even all the members cannot alter the doctrine. *Schnorr's Appeal*, 67 Pa. St. 138; *St. Mary's Church Case*, 7 Serg. & R. 517; *Den* v. *Bolton*, 12 N. J. L. 206; *Craigdallie* v. *Aikman*, 1 Dow, 1; *Foley* v. *Wonnter*, 2 Jac. & W. 245; *Leslie* v. *Birnie*, 2 Russ. 114; *Davis* v. *Jenkins*, 3 Ves. & B. 156; *Milligan* v. *Mitchell*, 3 Myl. & C. 72; *S. C.*, 1 Myl. & K. 446.

For cases in which courts have interfered to prevent funds given to support either Unitarianism or Trinitarianism from being used to support the other, see *Roshi's Appeal*, 69 Pa. St. 462; *Rottman* v. *Bartling*, 22 Nebraska, 375; *Attorney General* v. *Hulton*, 7 Ir. Eq. 612; *Miller* v. *Gable*, 2 Denio, 492, 548; 2 Story, Eq., § 1191*a*; *Attorney General* v. *Pearson*, 3 Meur. 353; *S. C.*, 7 Sim. 290; *Shore* v. *Attorney General*, 9 Clark & F. 355; *Attorney General* v. *Shore*, 11 Sim. 592; *Attorney General* v. *Wilson*, 16 Sim. 210; *Attorney General* v. *Drummond*, 1 Dru. & W. 353; *Christian Church* v. *Carpenter*, 108 Iowa, 650; *Cape* v. *Plymouth Church*, 117 Wisconsin, 155; *Rodgers* v. *Burnett*, 108 Tennessee, 173.

It is the duty of courts to see that dedicated property is not diverted from the trust to which it has been dedicated. *Lamb* v. *Cain*, 129 Indiana, 486; *Smith* v. *Pedigo*, 145 Indiana, 385 and 406; *Princeton* v. *Adams*, 10 Cush. 129. The guaranty of religious freedom does not affect this rule. *Bear* v. *Heasley*, 98 Michigan, 279. The right to the property depends

not on numbers but on those who adhere to the doctrine specified in the dedication. *Baker* v. *Ducker*, 79 California, 365; *Peace* v. *Christian Church*, 20 Tex. Civ. App. 85; *Greek Church* v. *Orthodox Church*, 195 Pa. St. 425; *Dochkus* v. *Lithuanian Society*, 206 Pa. St. 25; *Roshi's Appeal*, 69 Pa. St. 462; *Clark* v. *Brown*, 108 S. W. Rep. 421; *Mack* v. *Kime*, 129 Georgia, 1; *Marien* v. *Evangelical Congregation*, 132 Wisconsin, 650. This property whether in the hands of the mission, government, or trustees was impressed with a trust for a religious use, and failure to enforce a trust is not barred by mere lapse of time. *Oliver* v. *Piatt*, 3 How. 333, 411; *New York Indians* v. *United States*, 170 U. S. 1.

Mere silence or delay will not defeat the action where the obligation is continuous. *Tynan* v. *Warren*, 53 N. J. Eq. 313; *Union College* v. *New York*, 173 N. Y. 38; *Ryder* v. *Loomis*, 161 Massachusetts, 161; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Massachusetts, 290; *Royal* v. *Aultman Co.*, 116 Indiana, 424; Angell on Limitation, 5th ed., § 72; *Ganley* v. *Bank*, 98 N. Y. 487.

Past breaches can be waived by considering the condition still in effect with knowledge of the breaches. *Hubbard* v. *Hubbard*, 97 Massachusetts, 188; *Payson* v. *Burnham*, 141 Massachusetts, 547; *Linzee* v. *Mixer*, 101 Massachusetts, 512; *Bacon* v. *Sandberg*, 179 Massachusetts, 396. Neglect and remissness may not constitute a breach. There must be an intent not to carry out the contract. *Osgood* v. *Abbott*, 58 Maine, 73; *Mills* v. *Seminary*, 58 Wisconsin, 135; *Coleman* v. *Whitney*, 62 Vermont, 123. Mere silence and delay do not create estoppel against forfeiture. *Gray* v. *Blanchard*, 8 Pick. 284; *Maginnis* v. *Ice Co.*, 112 Wisconsin, 385. Parol assent without change of situation does not destroy express condition. *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Plumb* v. *Tubbs*, 41 N. Y. 442; *Congregationist Society* v. *Osborn*, 94 Pac. Rep. 881; *Howe* v. *Lowell*, 171 Massachusetts, 575. Patient endurance of repeated breaches does not bar right to rescind when the conduct becomes unendurable. *Gall* v.

Gall, 126 Wisconsin, 390; and on this point see also *Bleecker* v. *Smith*, 13 Wend. 530; *Doe* v. *Woodbridge*, 9 B. & C. 376; *Dakin* v. *Williams*, 17 Wend. 447; *Doe* v. *Jones*, 5 Exch. 498; *Farwell* v. *Easton*, 63 Missouri, 446; *Alexander* v. *Hodges*, 41 Michigan, 691; *Adams* v. *Copper Co.*, 7 Fed. Rep. 634. A demand or equivalent act is necessary to set statute in motion. *Preston* v. *Bosworth*, 153 Indiana, 458; *Water Power Co.*, v. *Belin*, 69 Minnesota, 253; *Lewis* v. *Lewis*, 74 Connecticut, 630; *Hadley* v. *Manufacturing Co.*, 4 Gray, 140; *Crane* v. *Hyde Park*, 135 Massachusetts, 147; *Merrifield* v. *Cobleigh*, 4 Cushing, 178; *Ward's Appeal*, 35 Connecticut, 161; *Yeary* v. *Cummins*, 28 Texas, 91; *Link* v. *Jarvis*, 33 Pac. Rep. 201; *Eames* v. *Savage*, 14 Massachusetts, 425; *United States* v. *Louisiana*, 123 U. S. 32; *Bonnivell* v. *Madison*, 107 Iowa, 85; *French* v. *Merrill*, 132 Massachusetts, 525; *Cromwell* v. *Norton*, 193 Massachusetts, 293; *Stretch* v. *Schenck*, 23 Indiana, 77; *Parks* v. *Satterthwaite*, 123 Indiana, 411; *Horner* v. *Clark*, 27 Ind. App. 6.

For cases in which the statute did not run from the breach but the demand, see *Lydig* v. *Braman*, 177 Massachusetts, 212; *Babcock* v. *Wyman*, 19 How. 289; *Stringer* v. *Stringer Co.*, 93 Georgia, 320; *Parker* v. *Gaines*, 11 S. W. Rep. 693; *Goodwin* v. *Ray*, 108 Tennessee, 614; *Bolles* v. *Stearns*, 11 Cush. 320; *Owen* v. *Higgins*, 113 Iowa, 735. Nor after condition broken until forfeiture asserted. *St. Louis R. R.* v. *McGee*, 115 U. S. 469; *Bybee* v. *Ore. & Cal. R. R.*, 139 U. S. 663; *Topham* v. *Braddick*, 1 Taunt. 572; *Wright* v. *Hamilton*, 2 Bailey's Law, 51; *Collard's Admr.* v. *Tuttle*, 4 Vermont, 491.

Where an agreement is in the alternative a money demand does not arise until a refusal to convey. The choice is primarily in the promisor. *Mayer* v. *Dwinell*, 29 Vermont, 298; *Foster* v. *Goldschmidt*, 21 Fed. Rep. 70; *Dessert* v. *Scott*, 58 Wisconsin, 390; *Smith* v. *Sanborn*, 11 Johns. 59.

The day before payment the obligor, the day of payment the obligee, can elect. *McNitt* v. *Clarke*, 7 Johns. 465; *Patchen* v. *Swift*, 21 Vermont, 292; *Ross* v. *Sutton*, 1 Bailey's Law, 129. See also *Barker* v. *Jones*, 8 N. H. 413; *White* v.

Toncray, 5 Gratt. 179. On refusal the election passes to the obligee. *Ramsey* v. *Waltham*, 1 Missouri, 395; *Phillips* v. *Cornelius*, 28 So. Rep. 871; *McMillan* v. *Philadelphia Co.*, 159 Pa. St. 142; *Center* v. *Center*, 38 N. H. 318; *Litchfield* v. *Irvin*, 51 N. H. . *Hartmann* v. *United States*, 35 C. Cl. 106.

The effect of the statute of limitations was fully disposed of on the last appeal. 206 U. S. 206.

Plaintiffs are entitled to maintain this action. *McCandless* v. *Castle*, 19 Hawaii, 518; *Oahu R. & L. Co.* v. *Armstrong*, 19 Hawaii, 258. The court below could not authorize a new defense. *Murphy* v. *Utter*, 186 U. S. 95.

Mr. C. R. Hemenway, Attorney General of Hawaii, for appellee:

There was no breach of the condition, but substantial compliance has been continuous as to giving religious instruction.

If, however, there has been any breach it occurred as early as 1877 and any action thereon is barred by the statute of limitations. Section 2004, Rev. Laws, Hawaii; *Hartmann* v. *United States*, 35 C. Cl. 106; *Butler* v. *United States*, 23 C. Cl. 335; *Carlisle* v. *United States*, 29 C. Cl. 414; *Aachen & Munich Fire Ins. Co.* v. *Martin*, 156 Fed. Rep. 654; *Brown* v. *Houdlette*, 10 Maine, 399; *Davis* v. *Brown*, 98 Kentucky, 475; *Wilcox* v. *Plummer's Exrs.*, 4 Pet. 172; *Finn* v. *United States*, 123 U. S. 227; *United States* v. *Connor*, 138 U. S. 61; *United States* v. *Greathouse*, 166 U. S. 602; *United States* v. *Wardwell*, 172 U. S. 48; *Kendall* v. *United States*, 107 U. S. 123; *De Arnaud* v. *United States*, 151 U. S. 483.

These cases also show that the statute runs from the time the claim becomes perfect and complete. On this point see also *Riddle* v. *Beattie*, 77 Iowa, 168; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90.

Whenever there is an adequate remedy at law the statute will be held to apply, even though relief may be sought in equity, and the statute will run from the time the first cause

of action accrues. *Jewell* v. *Jewell*, 139 Michigan, 578; *Hayward* v. *Gunn*, 82 Illinois, 385; *Agens* v. *Agens*, 50 N. J. Eq. 566; *Roberts* v. *Ely*, 113 N. Y. 128; *Egerton* v. *Logan*, 81 N. C. 172; *Townsend* v. *Eichelberger*, 51 Ohio St. 213; *Hostetter* v. *Hollinger*, 117 Pa. St. 606; *Wallace* v. *Lincoln Bank*, 89 Tennessee, 630; *Merton* v. *O'Brien*, 117 Wisconsin, 437; *Cone* v. *Dunham*, 59 Connecticut, 145; *Farnam* v. *Brooks*, 9 Pick. (Mass.), 212, 242; *Merrill* v. *Monticello*, 66 Fed. Rep. 165; *S. C.*, 72 Fed. Rep. 462.

The findings of fact from which the conclusion that there was no breach reached by the Supreme Court of Hawaii necessarily are binding and conclusive upon this court. *Halsell* v. *Renfrow*, 202 U. S. 287; *San Pedro Co.* v. *United States*, 146 U. S. 120; *Zeckendorf* v. *Johnson*, 123 U. S. 617; *Eilers* v. *Boatman*, 111 U. S. 356; *Sturr* v. *Peck*, 133 U. S. 541; *Sims* v. *Sims*, 175 U. S. 162; *Holloway* v. *Dunham*, 170 U. S. 615; *Idaho Co.* v. *Bradbury*, 132 U. S. 509; *Grayson* v. *Lynch*, 163 U. S. 468.

Plaintiffs are not entitled to maintain this or any cause of action for a breach of this agreement. The agreement under which they hold only refers to real property and not to a claim of this nature.

Even if this might have been raised by demurrer, it is not waived, as no officer could waive a defense for the Territory. *Peacock* v. *Republic of Hawaii*, 11 Hawaii, 404; *Kendall* v. *United States*, 107 U. S. 123; *Carlisle* v. *United States*, 29 C. Cl. 414; *Finn* v. *United States*, 123 U. S. 227; *Christie Street Com. Co.* v. *United States*, 129 Fed. Rep. 506; *De Arnaud* v. *United States*, 151 U. S. 483; *United States* v. *Utz*, 80 Fed. Rep. 851.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is the second appeal in this case. The first appeal was from a judgment in favor of the Territory, entered upon demurrer to the complaint, which judgment was reversed. *Lowrey* v. *Hawaii*, 206 U. S. 206.

The action is for the sum of $15,000, which the Hawaiian government reserved the right to pay, instead of deeding back certain lands conveyed to it by the American Board of Commissioners of Foreign Missions in 1849. The facts as alleged in the complaint are set out with considerable fullness in the report of the case on the first appeal and need not be repeated. Upon the return of the case to the Supreme Court of the Territory an answer was filed, denying "all and singular the matters, allegations and things set forth," and giving notice that the Territory would "rely in making its defense *inter alia* on the statute of frauds." Subsequently the plaintiffs made a motion upon the record and "upon the judgment in the Supreme Court of the United States" for judgment. The Territory made a motion to amend its answer to set up the statute of limitations. The plaintiffs' motion was denied, that of the Territory was granted, to which rulings plaintiffs excepted. Testimony was taken, which was directed principally to the question of the breach of the condition upon which the conveyance to the government was made. The court, in its opinion, says that, in addition to the "large amount of documentary and other evidence," it has "also referred to proceedings of a public nature, of which it could ordinarily take judicial notice, and to documents from the public archives, when specially referred to in the exhibits on file." Concluding from this and the other evidence that the plaintiffs were not entitled to recover, it rendered judgment for the Territory. 19 Hawaii, 123.

The decision on the first appeal is an important factor in the determination of this, for upon that, as a guide, the Supreme Court of the Territory accepted evidence and determined the meaning of the agreement by which the lands were conveyed.

The American Board of Foreign Missions for many years prior to 1850 conducted a Protestant mission in the Hawaiian Islands, and, as an essential part of its work, carried on many schools. Its most notable work was centered in a school, established in 1831 at Lahainaluna, on the island of Maui, where

it possessed a large tract of land. The purpose for which the conveyance of this school to the Hawaiian government was made and the course of instruction in it, before and after the conveyance as explaining that purpose, make the controversy in this case. It is contended by appellants that the course of instruction in the institution comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrine represented by the mission, that is, the doctrines of the Congregational and Presbyterian churches of the United States, and was expressed in a "Confession of Faith," which was attached to the agreement that transferred the property to the Hawaiian government. "The central purpose of the agreement was," counsel for appellant contended on the other appeal, "to 'continue' an established institution, the keystone of a system with defined and well-known aims, the chief being the promotion of religion by instruction in definite religious truth." The opposing contention was that the doctrine to be taught was not specialized, that there were no restrictions upon the course of instruction, except that it should not be, using the words of the agreement, "contrary to those theretofore inculcated by the mission;" and, insisting that those words constituted the complete measure of the obligation of the government, resisted the attempt of the appellants to go outside of them to ascertain the purpose of the parties. These contentions were considered and the grounds of them accurately distinguished. The contention of the appellants was accepted. It is not necessary to repeat our reasoning at length. Our conclusion was that the Hawaiian government engaged to teach not only secular science, but the definite religious doctrine expressed in the confession of faith, attached to the agreement. The latter, we said, was "not in a formally executed paper," but was found in a correspondence. "And taking the whole of it," it was said, "there is a very little aid from extrinsic evidence needed to demonstrate its meaning and purpose." And after considering some parts of the correspondence, we con-

cluded as follows (p. 221): "The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be 'still more definite and of equal or greater importance,' that is, 'to educate young men to be Christian ministers.' A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its 'fostering care and patronage.' And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered."

The right to resort to extrinsic evidence, against the contention of the Territory, was decided, but the amount of aid that the correspondence needed or received from such evidence we explicitly pointed out. We said that the "justness" of the conclusion expressed in the paragraph quoted above was, without extrinsic evidence, "almost indisputable," and that it became "indisputable if extrinsic evidence be considered." In other words, it was decided that the probative force of the correspondence was sufficient without other evidence to establish the agreement in accordance with the contention of appellants. The Supreme Court of the Territory underestimated this ruling and entered into an extensive inquiry of circumstances from which it decided the agreement to be what this court had decided it not to be.

It may be that we could rest the case on the prior decision without considering the new evidence which was received, or, rather, the new facts which are expressed in the findings of the Supreme Court. But as that learned court based its decision upon them and the Territory earnestly urges them as taking this appeal out of the ruling on the former appeal, we have given consideration to them. We cannot, however, without extending this opinion to a great length, quote them in full, and will, therefore, only state their character and what they establish or tend to establish.

The findings set forth the circumstances which preceded

the transfer to the government, as exhibited in the observations of Commodore Wilkes in 1841, and the report of the principal of the school in 1848. Commodore Wilkes observed a defective and inefficient administration of the affairs of the school and its funds, which might have been "avoided" by a full examination of the subject by "practical men," and a decadence in consequence from its "meridian." The principal's report personified the school and made it conscious of the loss of admiration, but he said "she stands at her post, and is contented to do good in a more humble way than when the friends and lovers of her youth stood by and praised her." He said that during 1849 "studies at the institution were practically broken up by reason of various sicknesses which attacked the principal's family, and that, in consequence, "school operations were suspended in February, and no new class entered pending the action of the general meeting of the mission," and he "thought it best" to await that meeting, for, as he said, "the late unparalleled diminution of the population may also have some effect in modifying the views of the mission in regard to this school and render it expedient in their minds to alter its operations or the number of its scholars." If a new class was to be called, he said, he had "a few considerations, 'to present,' to the brethren to guide them in their selections." And again: "Many thousands of dollars have been wasted or unprofitably laid out upon young men sent there of only middling ability and low morals. It has been with regret that the teachers have had to select, with a few good ones, many young men of doubtful talents and worth to make up a class when they felt there were enough in the nation that would do honor to their training at the seminary."

"Besides these conditions," the findings of the court recite, "and the emigration to the gold fields of California, the general meeting had to face an embarrassed condition of the funds of the home board and the consequent curtailment of the allowance to the mission. (From report of committee,

April 25, 1849.) It was under these circumstances that the offer of transfer to the Hawaiian government was made."

It may be well to comment on the facts as we go along, and we may say we see nothing in these declarations and reports that militates with the views of the agreement expressed in our former opinion. We see no intention in them or reason for abandoning the purpose for which the school was founded. Indeed, intention and reason for its better fulfillment by a transfer to the government. The school would receive more constant support under the government. The young men of "doubtful ability and low morals" might not seek its instruction, could be more easily rejected if they did so, and those "in the nation that would do honor to their training at the seminary" might be attracted by the sanction which would be given to their ability and morals. That this was the hope which induced the transfer is almost expressed in the correspondence which forms the agreement.

This was in effect declared in the opinion on the first appeal and the quotation from that becomes apposite. Stating a part of the correspondence which contained the offer to the government, we said (206 U. S. p. 220):

"The Mission reminds the Minister of Public Instruction that the seminary was established in 1831, 'to promote the diffusion of enlightened literature and Christianity throughout the islands,' and that it had been unceasingly watched over, cherished and cared for by the Mission, and that $77,000 had been expended for its benefit. It was stated that in consequence of debts incurred 'in the prosecution of its labors of benevolence and mercy' the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the missions under its care, including the Hawaiian mission, and that the latter for that reason would be 'unable to carry forward its operations with the vigor to be desired in all of its departments of labor.' In view of these facts, it was stated and believed that under the circumstances the transfer of the institution 'to the fostering care and patronage of the

government' would 'promote the highest interest of the Hawaiian people.' An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was enclosed. The government modified the proposal by reserving the right to pay $15,000, as an alternative to the reversion of the property to the Mission if the government should not fulfill the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted to that originally proposed."

And from this, it followed, we further said, as we have seen, that the school was established "'to perpetuate the Christian religion,'" and had purpose, still more definite and of equal or greater importance, that is, "'to educate young men to be Christian ministers.'" And of this, "the government was informed of when the proposition was made to transfer the school to its 'fostering care and patronage.'"

There are, however, other findings of fact. It is found that there was substituted for the first confession of faith, which was printed, a second confession of faith, which was written. In a letter which accompanied the latter it stated that the first was "not so distinctive as to prevent a barrier to the introduction there (in the school) of other and deleterious doctrines not specified in the said confession." It is said by the Supreme Court of the Territory that it was "worthy of note" that it did not appear that the "Prudential Committee" had been advised of the substitution. We think this unimportant. Even if it did not, therefore, become a part of the agreement, it certainly expressed the purpose of the agreement. It was, however, considered by the parties as a part of the agreement.

The curriculum of the school from 1835 to 1863 is inserted in the findings, by which studies were arranged for a course of four years. This appears:

"The laws of the high school were read, amended and the different articles adopted as follows:

"'Whereas in the good providences of God, the experiment

of the high school established by the mission in 1831 having proved successful, and having accomplished all that could reasonably have been expected, and the necessity of such an institution still continuing, the directors now lay before the mission a more definite and enlarged plan of operations, such as they suppose from actual experiment to be practicable, and of the highest interests to the moral, social, literary and spiritual condition of this people.' "

The design of the high school is set forth in six chapters, which express provisions for teaching general literature and the sciences, and the following, being paragraphs one and four and paragraph five of chapter one.

"To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious."

"4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellowmen.

"5. He shall also watch over the moral and spiritual interests of the scholars; he shall cause a portion of their weekly studies to be directed to the great truths of the Bible, that while they increase in science and literature they may have the means of that knowledge which makes wise unto salvation."

It is found, however, that "so far as the proposed curriculum contemplated the preparation of graduates of the school for immediate service in the ministry, it was never carried out, though frequently referred to by contemporaneous writers as the eventual design of the school."

It is further found that the main object of the school from 1835 to 1839 was the education of Hawaiian teachers for the common schools. The curriculums of other years are given, and it is found that, "after the transfer to the government the

institution continued to be primarily for the education of teachers (Report Minister Public Instruction, 1850, p. 26; Report President Board of Education, 1872, p. 4), from the middle classes of the Hawaiian people (Report President Board of Education, 1886, p. 3). Education for the ministry is not referred to in any official report as one of the purposes of the school, but the most that could be said is the statement by Rufus Anderson, secretary of the A. B. C. F. M.: " A year spent in theological study with a missionary is thought sufficient to prepare a pious graduate of Lahainaluna for the pastoral office." Anderson, The Hawaiian Islands, p. 189.

And there are findings as to the events of 1863, 1864 and 1865, the principal of which was the opinion of the Attorney General, and a dispute between the mission and the Board of Education as to the right of appointment of teachers.

The opinion of the Attorney General recognized that the school was received by the government and was held by it, under conditions which, if not performed, would require the government to reconvey the property or pay the mission fifteen thousand dollars.

The dispute over the appointment of teachers arose in April, 1865. In a letter to the President of the Board of Education the mission asserted the right to appoint, and suggested the names of certain persons. The Board of Education replied, asking for the grounds "on which any such claim to interfere in the internal management of said school appear to you to be founded." The mission replied, asserting the right of appointment as a means of accomplishing the purpose of the transfer. It was said that nothing was "more evident than that the mission intended carefully to guard against the introduction into the institution of any doctrine, practice or influence antagonistic to its own faith and practice and form of Christian worship." And they asserted, further, that "nothing could be clearer than that the missionaries contemplated still to have this a co-operating institution to aid them, as it had already done in times past, in the diffusion of

solid science and Christianity *as they understood it*, as benevolent Congregationalists and Presbyterians of the United States, who had contributed to build and sustain the institution understood and practiced it." And it was said that "an object so dear to them would not have been given up without the intention of so guarding in the future as to have it continue to aid instead of defeat the purpose for which it was founded." In further emphasis of this intention the writer of the letter said that he knew "that the intention was to secure the continued co-operation of the seminary in the work which the American Board was prosecuting" there "through its mission." The Board of Education admitted that the institution was to be continued so as to "aid instead of defeating the purpose for which it was founded," and said, "Nothing had been done to justify the intimation that the board" had "any desire to defeat such purpose or introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders." The board dissented from the view expressed by the mission, that the appointment of any man not acceptable to it to the post of teacher was a "violation of the whole spirit of the agreement," and said that a full compliance of the agreement consisted "in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States." The board concluded by saying that they were aware that if they did not see fit to carry on the institution according to the terms of the contract, they had to reconvey it or to pay the sum of $15,000, and that if the views expressed were not satisfactory, the board would think favorably of a proposition to reconvey it at once.

It will be seen, therefore, that from the agreement, as gathered from the correspondence and from the extrinsic evidence which we have detailed, there can be no doubt that the school was transferred by the mission and accepted by the government upon the condition that definite Christian doctrines should be taught, namely, doctrines which constituted

the belief of the Congregational and Presbyterian churches of the United States and not merely some form of general, evangelical Christianity.

Religious instruction, "represented by the second or substituted confession of faith," according to finding 23, was continued from 1875 to 1877.

In December, 1876, upon the recommendation of Dr. Bishop, a change was made from the Hawaiian to English as a medium of instruction, comment upon which will be presently made. We omit, as not important, the curriculum as to secular studies after 1877. The findings as to religious instruction must, however, be given in full:

"There is no evidence that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. There is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(29) From 1877 until the present date the course of religious instruction has been substantially the same. This includes morning prayer, including occasional discussions of passages of the scripture, compulsory attendance at Sunday-school with preparation of the international Sunday-school lessons furnished by the Hawaiian board itself, and compulsory attendance at Christian Endeavor exercises Sunday evenings, at which the pupils discuss biblical subjects based on the Christian Endeavor topic as given in the Christian Endeavor World. Nothing in this religious teaching is contrary to any religious tenet or doctrine expressed in the substituted confession of faith. Mr. Macdonald, who has been principal since 1903, testifies that no creed had been taught during that time at the school, but that he had tried to make upright, truthful Christian men, and held Christ up as the best example to follow; that he had taught nothing about the Pope, or the doctrine of the trinity, or the doctrine of Adam's fall, or that the descendants of Adam were without holiness and alienated from God until their hearts were renewed with divine grace; that on

Sunday there was a Sunday-school and occasionally, in the morning, a preaching service, in the evening a Christian Endeavor meeting; that the first year he was in Lahainaluna the boys were allowed to go to Lahaina to their own churches, but since then, with the exception of the day scholars numbering ten or twelve, they were required to stay on the ground on Sunday and attend Sunday-school and the evening exercises; that the chapel exercises on week day mornings lasted about ten minutes and consisted of a hymn, a portion of the scripture and a repeating of the Lord's Prayer in unison, and occasionally incidental remarks by the principal regarding the passage of the scripture; that there was no direct Christian instruction given in the class room exercises during the week days other than moral instruction, as teaching the boys to do their work honestly; that the Sunday morning exercises consisted of a regular system of Bible instruction following the international Sunday-school lesson series purchased from the Hawaiian Board; that the Sunday-school lessons were assigned in advance; that in the Christian Endeavor meetings the Christian Endeavor topic in a modified form as given in the Christian Endeavor World was usually taken, and prayers sometimes offered by the boys and the teachers.

"(30) There is no evidence of any protest with regard to Lahainaluna or the course of study there from the American Board or from the Hawaiian Evangelical Association as bodies, but first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board."

It is further found that "technical and agricultural training have been prominent features of the school for over half of a century, and the emphasis laid on agricultural work in the past few years does not amount to a change in kind, but one in degree. There has been no change in the official designation of the school."

In 1903 there was a movement to obtain the Federal aid available for agricultural colleges, in connection with which the Deputy Attorney General gave an opinion as to the

character of the school, the conditions upon which the government of Hawaii had received it and the effect of the provisions of the Organic Act of the Territory, that "no public money be appropriated . . . for the support or benefit of any sectarian, denominational or private school." The opinion is quoted at length in the findings, but we are only concerned with parts of it. It recognizes that the school was received upon the condition of cultivating sound literature and solid science. This, it was said, was affirmative and could not be escaped. The provision for religious instruction, he declared, was negative, and was satisfied by no religious teaching whatever. His conclusion was, and we quote his words, "So long as the government maintains this school it shall not teach any doctrine contrary to the confession of faith, but it is not compelled to teach any religious doctrine whatever, and therefore, in my opinion cannot be held to be a sectarian institution." And further, "that the school is not a sectarian institution under the prohibition stated in section 55 of the Organic Act."

As we have said, the Supreme Court of the Territory gave especial prominence to the ruling on extrinsic evidence, and made it contradictory to the agreement as expressed in the correspondence. This result was worked out, as it seems to us, by giving too much effect to the curriculum of the school after 1877. That, indeed, might be considered as tending to show that the agreement had been abandoned or its conditions waived, but not that it did not exist. To this proposition of abandonment or waiver we then will address ourselves, and as relevant to it the views of the Supreme Court of the Territory may be given. They are exhibited in the following paragraphs (pp. 146, 147):

"Under the decision of the United States Supreme Court we are to construe the condition of transfer in the light of the circumstances which preceded it and the immediate and long continued practice under it. Confining ourselves for the present to the condition respecting religious instruction reading,

'It shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed,' the following possible constructions of the language may be considered:

"(1) That the condition is purely negative in character and does not require the teaching of any religious doctrine. This construction is precluded by the decision of the United States Supreme Court.

"(2) That the contents of the confession of faith should be taught as a formal doctrine or creed. There is no evidence that the parties ever acted upon this interpretation. No evidence has been presented that the substituted confession of faith was in use at Lahainaluna as a creed, doctrine or standard of religious instruction at any period. Dr. Bishop, who was in the school from 1865 until 1877, testified that he had never seen it. (Transcript, p. 13.) In fact, there is no evidence of any formal creed as a standard to which the pupils were required or instructed to adhere.

"(3) That religion should be taught and that as taught it should not be contrary to the doctrines mentioned. Thus construed it is obvious that it allows considerable latitude in the amount of religious instruction. If it means that theology shall form part of the curriculum of the school the condition was broken as early as 1877 and any action thereon is long since barred by the statute of limitations applicable to claims against the government. R. L. Sec. 2004; *Hartman* v. *United States*, 35 C. Cl. 106. If, however, the acts and statements of the parties in 1865 are to be relied upon as contemporaneous construction the same must be true of the acts of the parties in 1877 and from thence to the present day. The fact that the change from Hawaiian to English as a medium of instruction necessarily involved the discontinuance of abstract studies of a theological nature is obvious. The fact that this change was made upon the recommendation of Dr. Bishop and with the full acquiescence of all concerned

from 1877 until 1903 is surely as potent as the actions of the parties during the preceding years. To the present day there has been no protest from the American Board or from the Hawaiian Evangelical Association as bodies, but the first objection is from the plaintiffs who are trustees of certain property rights under deed from the American Board, the terms of which will be more fully considered later.

"Unless the condition prescribes the amount and extent of religious instruction it has not been broken. From 1877 until the present date the course of religious instruction has been substantially the same."

The first proposition, the court said, was precluded by our first decision; of the other two, the court felt free to exercise its judgment. In this it committed error. We have shown how antagonistic the contention of the parties were, and we tried to be clear in our decision of them. We did more than decide that the condition as to religion was not negative. We gave it more force than simple inhibition of teaching something which was not inconsistent with the religion of the mission. We gave it the force of a requirement to teach that religion, and more, to educate young men to teach it. The Supreme Court, however, says that there is no evidence that the parties ever acted upon the interpretation "that the contents of the confession of faith should be taught as a formal doctrine or creed." Exactly what is meant by the words "formal doctrine or creed" is not clear, but if they mean the religion of the mission, the conclusion was not open to the court to draw nor do the findings sustain it. Dr. Bishop testified, it is true, that he had never seen the confession of faith until it was shown in the present case, but he also testified that "the system of doctrine which was taught was substantially the old orthodox, Congregational or Presbyterian doctrine." As to the confession of faith, he said, "that it very well represented the form of doctrine taught at Lahainaluna." Nor do we draw the same conclusion from the change from Hawaiian to English as a medium of instruction that the Su-

preme Court drew. Dr. Bishop did recommend the change, and he expressed a fear that the consequences might be an omission of studies of an abstract nature, in which he included "evidences of Christianity;" but he suggested such instruction could be committed to the "exceptionably" able Hawaiian teacher whom he mentioned. But there is nothing in that to show that a definite form of religion could not be taught. There might be difficulty in it, of course, but that such a difficulty could not be overcome would take all purpose or justification from missionary societies. Besides, because the school met difficulties, and might have to yield temporarily to them for varying periods of time, cannot be considered as conclusive of the intention of the parties to abandon the purpose expressed in the agreement or to waive its obligations. And this is an answer to the other contentions of the Territory. That the mission would encounter difficulties in its way was no doubt guessed when the school was founded. It was demonstrated by trial. For the better execution of the purpose of its foundation, the mission transferred it to the government. The government, too, met difficulties. Its duty was to strive against them, overcome them if possible, not to make them a reason to violate its contract. But it is said by the Supreme Court that if the condition be "that theology shall form part of the curriculum of the school, the condition was broken as early as 1877, and any action thereon is long since barred by the statute of limitations applicable to claims against the government." This might be if the obligation of the government had been to pay money simply. Its obligation was not that, as we have seen, but to perform a trust expressly assumed by it. In other words, it was the grantee of an estate upon condition, having the right, however, to elect to pay $15,000 as an alternative of the performance of the condition. We find no evidence of such election in what occurred in 1877, nor indeed long subsequently to that date. The circumstances must be kept in mind and the relation of the parties. The government had received a gift of valuable property, the

product of voluntary contributions. It was given and received for a special purpose, the purpose for which the contributions were made. The government accepted it and pledged its faith for the execution of the purpose, a faith, we may assume, which was as much relied on as the sanctions which accompanied it. It is not possible to believe that the government had so little sense of its obligations that if it had intended to depart from its agreement it would not have offered to reconvey the property or tender the execution of the alternative which it had reserved; and we certainly cannot hold that a mere change in the course of studies, which might have temporary excuse, instantly acted to make the grantors of the property a claimant for money against whom the statute of limitations would immediately begin to run. The government's right should not be overlooked in this connection. The following is the condition expressed in the proposal made to the government: "That in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges hereby conveyed or transferred to the Hawaiian government, by the said island mission, shall revert to the said mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." The acceptance of the government was as follows: "That in case of nonfulfillment on the part of the government of the conditions specified it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said mission or pay the sum of $15,000." The onus, therefore, was upon the government to act, not upon the mission. To avert the reversion of the property to the mission a way was provided, but it did not enter into the head of anybody that by a fail-

ure to adopt it instantly upon a change of studies the property passed back to the grantor. But such was the inevitable result if there was a breach of the conditions in 1877, and such was the result if there was a breach later than 1877. It might be contended that such result would not ensue without some action upon the part of the mission. But it was certainly optional with the mission to treat the breach, if there was a breach, as a forfeiture. It is said in *Hubbard* v. *Hubbard*, 97 Massachusetts, 188, that it is optional with the grantor of an estate upon condition, in case the breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate. To do so, it is further said, requires action on his part, and, if he is not in possession, usually requires entry for breach of condition. Until such entry the grantee holds his estate liable only to be defeated, but it is not actually determined by the forfeiture.

It is said in *Carbon Block Coal Co.* v. *Murphy et al.*, 101 Indiana, 115, 117, 118: "'A condition may be waived by the one who has a right to enforce it, . . . But a mere silent acquiescence in, or parol assent to, an act which has constituted a breach of an expressed condition in a deed, would not amount to a waiver of a right of forfeiture for such breach.' *Lindsey* v. *Lindsey*, 45 Indiana, 552, p. 567; 2 Washb. Real Prop. 16. A mere indulgence is never construed into a waiver of a breach of condition. *Gray* v. *Blanchard*, 8 Pick. 284; *Jackson* v. *Crysler*, 1 Johns. Cases, 125."

In *Trustees of Union College* v. *City of New York*, 173 N. Y. 38, a deed conveying land to Long Island City for the purpose of building a city hall contained the provision that if the land should cease to be used for such or other similar buildings the land should revert to the grantor as if the conveyance had not been made, was held to be a condition subsequent and required the grantee to comply therewith within a reasonable time. It was further held that ten years was a reasonable time for compliance with the covenant, and that the fact that the grantor did not assert a right to reënter for fifteen

years after the breach did not operate as an estoppel or preclude him from insisting upon a forfeiture and claiming possession. It was also held that a grantor was not compelled to demand performance before bringing action of ejectment. The court said (p. 42):

"The condition was the use and the continuing use of the land for the purpose of the grant. The long-continued silence of the plaintiff could not operate as an estoppel upon, or preclude, it from insisting upon a forfeiture, and from claiming possession of the premises. The effect of an express condition in a deed cannot be destroyed by silent acquiescence. (*Jackson* v. *Crysler*, 1 Johns. Cases, 125.) The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant. If it elected to await compliance as long as it did, that fact cannot be construed against its right to reclaim possession."

In *Althea Coleman* v. *Ralph Whitney et al.*, 62 Vermont, 123, a mortgage deed was executed by a husband, the condition of which was a promise to support the wife of the grantor during her life. The condition was performed for a time and then violated. The wife brought suit to obtain a maintenance from the mortgaged premises. It was held that she was entitled to such relief, notwithstanding there had been successive conveyances of the property, and the successive owners had occupied the premises under their deeds, and had, in no way recognized her rights; and it was held further, that the obligation to support the wife was a continuing one, and that "the lapse of fifteen years without receiving support, simply because she did not ask it, would be no bar."

It was said in *Oliver et al.* v. *Piatt*, 3 How. 333, 411, that the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trusts*.

In *Tynan* v. *Warren*, 53 N. J. Eq. 313, 321, Vice Chancellor Green, speaking for the court, said: "I do not understand that mere delay in bringing a suit will deprive a party of his remedy, unless such neglect has so prejudiced the other party by loss of testimony or means of proof, or changed relations that it would be unjust to now permit him to exercise his right." It is certain that none of those conditions appear in the present case. A mere change of the curriculum was not of itself an unequivocal disavowal of the trust, or an assertion of adverse right or interest in the government, and we find nothing in the record tantamount to such disavowal and assertion until the Governor of the Territory and the Superintendent of Public Instruction refused the demand of the plaintiffs' attorney to either pay the $15,000 or reconvey the property. The grounds of their refusal we are not informed of, but it was a disavowal of the trust and a denial of the alternative obligation to pay the money. The right of election in the Territory then passed to the plaintiffs, appellants here, and the bringing of the action was a sufficient exercise of it.

It is finally contended that the appellant cannot maintain this action. The Supreme Court of the Territory sustained this contention, saying, however, that it based its "decision upon the consideration of the substantial rights involved." The right of the plaintiffs is derived from a deed executed July 25, 1903, by the American Board of Commissioners for Foreign Missions to the plaintiffs as "trustees." It recites that the grantor is desirous of contributing to the support and maintenance of the Board of Hawaiian Evangelical Association, an eleemosynary corporation organized and established "in the great work of propagating Protestant Christianity, and for that purpose the land and property particularly described and referred to was conveyed in trust in order to assist said intended beneficiary to effectually carry out its corporate powers and purposes in said Hawaiian Islands." The instrument revokes and annuls all powers of attorney and grants of authority theretofore given to any person or persons whomso-

ever, and gives, grants, bargains and sells, conveys and confirms, unto F. J. Lowrey, Henry Waterhous and William O. Smith certain lands described in the schedule annexed to the instrument, together with "all other lands in the possession of or belonging to the said grantor or to which said grantor has right, title, interest, claim or demand whatsoever, at law or in equity, and whether held by it in fee simple, as lessee thereof, beneficiary therein, or otherwise, as fully and to all intent and purpose as though a particular description thereof was herein incorporated and included in said schedule . . ." to have and to hold the same "in trust, nevertheless for the following uses and purposes, that is to say: First. To hold, manage and control the same, and receive and take the rents, issues, profits, income and proceeds of sales and authorized mortgages thereof, and hold such increment and realizations under the same trusts as the above granted trust property, using and applying the same, however, in the manner hereinafter provided. . . Sixth. And, generally to do and perform every act and thing and exercise every power and authority whatsoever, not herein specifically denied or withheld from or herein directed to be otherwise done or exercised by said trustees, as fully and to every intent and purpose as though the said trustees were the absolute owners in fee in their own personal right of the property hereby conveyed. Seventh. Any and all moneys arising from or out of the property of the trust estate, whether by way of rents or other issues and income or from sales or mortgages thereof, shall be received and held by said trustees;" and, after the payment of taxes and other expenses, "and until otherwise directed," by the grantor, shall be delivered "to said beneficiary, from time to time, any balance or portion of the moneys, then remaining in their hands over and above what may, in their judgment, be required for the current expenses connected with the said trust, any unapplied balance to be placed on general deposit, or the said trustees may invest the same upon security as they may approve."

And the grantor reserved "the full right and authority, at any time or times, to direct any change or alteration in the disposition of the income and proceeds of the trust estate," or to remove any trustee or fill any vacancy however occurring.

It will be observed, therefore, that the instrument was designed to convey every interest in property that the grantor had. Considering its language and careful provisions, its purposes and the control reserved to the grantor of the trust and the disposition of funds, it would be a narrow construction of it to hold that the interest of the grantor in the Lahainaluna school did not pass by it, whether such interest was a right to receive a conveyance of the school or of the $15,000 which was to be in lieu of such conveyance. In other words, to completely enforce the rights and interests of the mission in the school and devote it or the proceeds from it to the purposes of the trusts which were created.

The judgment is reversed and the cause is remanded with directions to enter judgment for appellants as prayed for.

MR. JUSTICE BREWER took no part in the decision.